5

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1910~~ 1913

No. ~~930~~ 56

NEW YORK LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

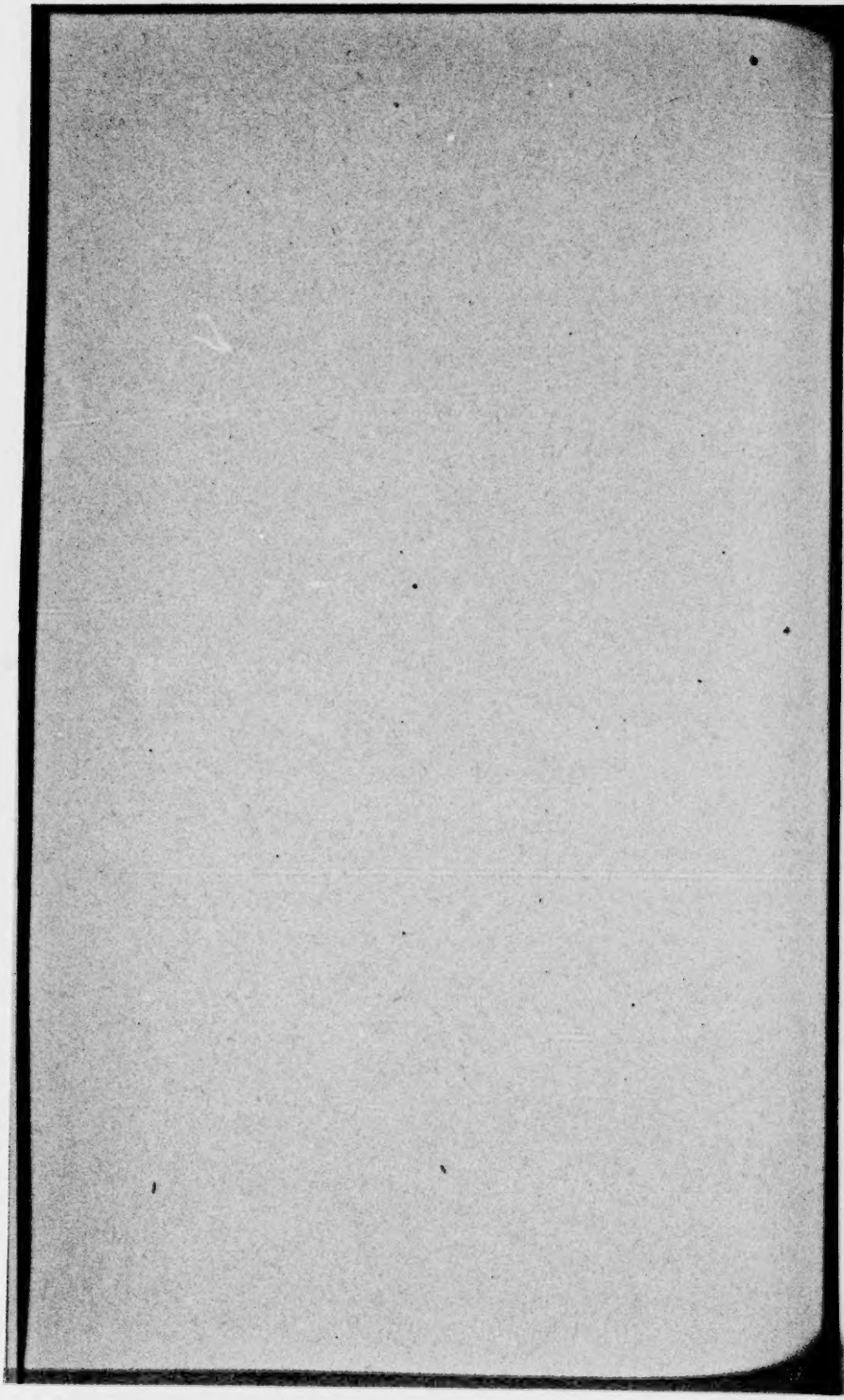
vs.

DEER LODGE COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

FILED JULY 15, 1911.

(22,801)



(22,801)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 383.

NEW YORK LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

DEER LODGE COUNTY

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. APRIL 28, 1913

1 TRANSCRIPT OF RECORD.

Supreme Court of the United States, — Term, 1911.

No. —.

NEW YORK LIFE INSURANCE COMPANY, Plaintiff in Error,
v.
DEER LODGE COUNTY, Defendant in Error.

In Error to the Supreme Court of the State of Montana.

Filed —— —, 1911.

2 In the Supreme Court of the State of Montana.

NEW YORK LIFE INSURANCE COMPANY, Appellant,
v.
DEER LODGE COUNTY, Respondent.

Appearances:

For Appellant: R. L. Clinton, James H. McIntosh.
For Respondent: T. P. Stewart.

Transcript on Appeal from the District Court of the Third Judicial District of the State of Montana, in and for the County of Deer Lodge.

Filed March 1— 1911.
JOHN T. —THEY,
Clerk of Supreme Court.

3 Service of the Transcript on Appeal hereinafter set forth in Transcript—pages 1 to 23, inclusive—is hereby admitted and copy had, this 8th day of March A. D. 1911.

T. P. STEWART,
Attorney for Respondent.

4 In the District Court of the Third Judicial District of the State of Montana, in and for Deer Lodge County.

NEW YORK LIFE INSURANCE COMPANY, Plaintiff,
v.
DEER LODGE COUNTY, Defendant.

Complaint.

The Plaintiff complains of the defendant and alleges:

First. That said plaintiff, New York Life Insurance Company, now is and ever since the year 1845 has been a corporation duly

organized and existing under and by virtue of the laws of the state of New York for the purpose of and engaged in transacting the business of insurance on lives and all and every insurance pertaining to life and receiving and executing trusts and making endowments, with its domicile, principal office and place of business in the city of New York in the state of New York; that said plaintiff calls its said principal office in the city and state of New York its Home Office and in this complaint Home Office means said principal office in the city and state of New York; that said plaintiff for many years last past has been engaged in transacting its said
5 business on a large scale with persons residing in every country of the civilized world, and in all the states, territories, districts and possessions of the United States.

Second. That the defendant, Deer Lodge County, is a political subdivision of the state of Montana, organized as a county under and by virtue of the constitution and laws of said state.

Third. That in the year 1869 said plaintiff commenced to transact its said business with residents, citizens and inhabitants of the territory of Montana, and continued uninterruptedly to do so during the remaining existence of the territory and from the inception of the state of Montana until the present time, and is still so engaged therein; that in the year 1883 there existed contracts of life insurance made and entered into between the plaintiff of the one part and several residents, citizens and inhabitants of said territory of the other part aggregating the sum of, to-wit: $600,000, which called for premium payments aggregating to-wit: $20,800 annually; that the amount of said outstanding insurance contracts between the plaintiff and several residents, citizens and inhabitants of said territory and state has progressively increased and amounted to the respective sums and called for premium payments annually in the several years below named as follows, to-wit:

Year.	Total insurance in force in Montana.	Calling for premiums aggregating annually
1893	$3,582,272	$109,429.
1895	3,729,927	112,152
1897	4,861,608	150,388.
1907	10,089,370	343,545
1909	10,023,445	343,664 93

6 That said total insurance is made up of several policy contracts averaging, to-wit, $2,000 each; that said several policy contracts are subject to sale, assignment and transfer, and to use as collateral security and for other commercial purposes, and they are a common subject of sale, assignment and transfer, and of use as collateral security, and for othe reommercial uses, and are valuable for each and all of said purposes and for other general purposes of trade and commerce.

Fourth. That said business is now being and always has been done and carried on through the agencies and in manner following, to-wit:

(a) Said plaintiff now has and ever since the year 1869 has had in its employ in said territory and state special agents authorized to solicit applications for insurance, to collect the first premium and to deliver the policy on applications taken by them, provided the company after considering such applications at its said Home Office prepared and transmitted the policy to such agent for said purpose. The several employment contracts of said agents were made in writing directly with the Home Office and did not take effect until they were countersigned by the contract registrar of the plaintiff at its Home Office.

(b) The plaintiff also now has and for more than fifteen years last past has had in its employ in said state a person known as Agency Director who was employed by contract in writing directly with the Home Office through the mails, and whose authority is limited to supervising the work of the soliciting agents, to recommending to the Home Office the employment of persons who desire to become soliciting agents for the plaintiff, and to soliciting applications for new insurance.

(c) The plaintiff has and ever since the year 1869 has had in its employ in said territory and state sundry physicians and surgeons called Medical Examiners appointed by the proper officers of the plaintiff at its Home Office, their said employment having been negotiated and made by correspondence through the mails. The authority of said Medical Examiners was and is limited to making physical examinations of applicants for insurance, to recording the results of such examinations, and to transmitting their said reports as such Medical Examiners to the plaintiff's Home Office where alone a rating is put upon the risk and the applicant's insurability passed upon and determined. If the Medical Examiner's report is incomplete or further information is required, the Home Office obtains further information by correspondence through the mails and by express. No Medical Examiner in Montana has ever been authorized to accept or decline a risk. This is and always has been done at the Home Office based upon the data obtained as aforesaid and upon other facts similarly obtained.

(d) Said plaintiff also has and for more than fifteen years last past has had in its employ in said state in various localities a confidential employee called an Inspector who is employed directly from the Home Office, whose employment is intended to be secret, and whose duty it is to furnish, and who does furnish, the plaintiff at its Home Office by Mail information about the habits, character, standing and other elements of moral hazard of persons applying to the plaintiff for insurance on their lives.

(e) Said plaintiff now maintains and for more than five years last past has maintained in the city of Butte in said state an office which is in the immediate charge of an employee who is appointed from the Home Office and known as Cashier. The authority of said Cashier is limited to making and supervising the making of such records as the business of said office requires, to receiving from soliciting agents and from Medical Examiners within said state applications for new insurance and medical examinations solely for trans-

mission to the Home Office of the plaintiff, to receiving from the plaintiff's Home Office the report of its action on such applications, to receiving from said Home Office and transmitting to the soliciting agent who took the application new policies of insurance, to receiving such premiums as are paid on new policies issued on the lives of persons residing or being within said state and as are not transmitted directly to the Home Office, to mailing to the persons residing within said state such premium notices as the plaintiff makes out at its Home Office and sends to said Cashier for that purpose, to receiving renewal premiums from policy holders within said state whenever such cashier is specially authorized by the Home Office to do so and the policyholders elect to pay them there instead of remitting directly to the Home Office where all premiums are by
9 the terms of the policy contracts made payable, to depositing said premiums to the credit of the plaintiff in bank in Butte to be drawn upon not by him but by the plaintiff from its Home Office on Thursday of each week, to notifying the Home Office daily of the sum that day deposited by him in bank, and to keeping account of the insurance obtained by the several soliciting agents in said state and, under the direction of the Home Office, settling with such agents their commissions earned in obtaining new insurance. Said plaintiff has never had any office or place of business for any purpose within said territory or state except said office in the city of Butte and except also an office with like powers, duties and authority in the city of Helena, which however is abandoned and closed, to-wit, five years ago.

The foregoing are all the agents, agencies or representatives of any and every kind the plaintiff has or ever has had within said state.

(f) It is, and always has been, the custom and practice of the plaintiff to appear at its Home Office and transact and it does prepare and transmit, to its several said employees within said state, forms for use in the several transactions in which said employees are authorized as aforesaid to engage, and the plaintiff keeps its said several employees supplied from its Home Office through the mails or by express with said forms.

(g) No agent or representative of the plaintiff in Montana has ever been authorized to accept risks of any kind, or to make, modify or discharge contracts, nor has any agent or representative
10 of the plaintiff within said state ever done any of said things.

All the officers of the plaintiff reside and have always resided in and near the city of New York and had their several offices and places of business at said Home Office except one of them who resides in Paris, France, and has his office and place of business there, and no one of them has ever resided or had a place of business in Montana. All risks are, and always have been, accepted and contracts made, modified and discharged by the officers of the plaintiff at its Home Office and not elsewhere. Said risks and contracts with policyholders residing or being within the state of Montana have each and all been negotiated and the several contracts made, modified, continued and performed in manner following, to-wit:

(1) When one of said soliciting agents takes an application for

insurance he takes it in writing on a form prepared at the Home Office and transmitted to such agent for said purpose. The applicant is then physically examined by one of the plaintiff's said local Medical Examiners who reduces said examination to writing on a form prepared by the plaintiff at its Home Office and transmitted to said examiner for said purpose. After such medical examination is made and reduced to writing as aforesaid and signed by the applicant and the examiner, then said application and said Medical Examiner's report are transmitted from said state to the Home Office of the plaintiff in New York for consideration. If the plaintiff at its Home Office after there examining and considering said application and Medical Examiner's report is satisfied with
11 the risk, it then and there writes up a policy contract in accordance with said application and forwards it through the mails to said state and if the Inspector's report when received is found to be satisfactory the plaintiff then directs the delivery of the policy and collection of the first premium. Said first premium, if not remitted directly to the Home Office by the policyholder, is delivered to the plaintiff's Cashier at Butte and is by him deposited in bank to the credit of the plaintiff and is drawn out of said bank by draft drawn by two officers of the plaintiff at its Home Office on Thursday of each week.

(2) Said policies each and all in consideration of the payment of the premiums called for therein obligate the plaintiff to pay the amount of insurance therein named at the Home Office of the company in city of New York upon receipt at said Home Office of satisfactory proofs of the death of the person named therein as the insured. They also each and all provide that all premiums are payable in advance at said Home Office or to an agent of the company upon delivery on or before the due date of the premium of a receipt signed by the President, a Vice-President, a Second Vice-President, a Secretary or the Treasurer of the company, each and all of whom are officers of said plaintiff. Said policies also each and all provide that no agent has authority to waive forfeitures, to make, modify or discharge contracts, or to extend the time for paying a premium; that none of these things can be done except by an officer of the plaintiff at its Home Office.

12 (3) At least fifteen and not more than forty-five days before the maturity of each premium the plaintiff mails to the policyholder a notice advising him of the due date of the premium, the amount to be paid, and stating therein that the same must be paid to the plaintiff at its Home Office or to the Cashier of its office in Butte on or before the due date, otherwise the policy will be forfeited and void. The plaintiff prepares and checks up said premium notices at its Home Office and transmits them by express to its office in Butte, where they are again checked up and mailed to the several policyholders.

(4) Said policyholders pay their premiums either directly to the Home Office through the mails or to the Cashier of the plaintiff's office at Butte. If payment is made to the Cashier of the plaintiff's office at Butte, said Cashier at once deposits the same in bank to the

credit of the plaintiff's account and daily transmits through the mails to the Home Office notice of the several sums by him that day received and deposited in bank. On Thursday of each week two officers of the plaintiff at its Home Office draw a draft for the full sum accumulated in bank to the plaintiff's credit as aforesaid, which said draft is transmitted through the mails and returns thereon are duly received by plaintiff at its Home Office through the mails. No person in said state has ever had power or authority to draw on said bank account. The plaintiff keeps another bank account in said city which is limited to a maximum credit balance of $500 on which alone said Cashier is authorized to draw checks and
13 which is used solely for paying the current expenses incident to the maintenance of said office in Butte.

(5) Said several policies provide for advances or loans to the policyholder on the pledge of the policy as security, and pursuant to said provision the plaintiff has outstanding advances or loans made to its policyholders in said state aggregating the sum of, to-wit, $432,878. For more than ten years last past the plaintiff has had outstanding advances or loans to policyholders in said state aggregating a large sum. Said loans have each and all been made by the policyholder transmitting to the Home Office of the plaintiff an application for the loan, which said application the plaintiff considered and acted upon at its Home Office, and if it accepted it the plaintiff made out at its Home Office a loan agreement which it forwarded by mail for execution and after executing it the policyholder forwarded the loan agreement and the policy to the Home Office and on receipt thereof at its Home Office the plaintiff forwarded the proceeds of the loan by mail to the policyholder within said state by the plaintiff's check drawn to the policyholder's order on its bank account in the city of New York. In this same manner the plaintiff is continuously making advances to its policyholders in Montana.

(6) When a policy matures as an endowment, the sum to be paid is calculated by the plaintiff at its Home Office and a check for the amount thereof is drawn to the order of the Policyholder on the plaintiff's bank account in the city of New York and is sent to the policy holder through the mails and is by him duly endorsed and deposited in bank in Montana, which in turn transmits
14 it to New York for collection and credit or return.

(7) Proofs of death are made on blanks prepared by the plaintiff at its Home Office in New York and transmitted to the claimant for the purpose of preparing such proofs and after completing them the beneficiary transmits them through the mails to the plaintiff at its Home Office where they are examined, and if found to be satisfactory the plaintiff pays the loss at its Home Office by drawing a check to the order of the beneficiary on its bank account in the city of New York, which said check it transmits through the mails to such beneficiary in the state of Montana, who on receipt thereof forwards to the plaintiff the policy together with receipt for its proceeds and deposits the check in bank which col

lects the amount of the check as in the case of the payment of matured endowments.

Fifth. All the business of the plaintiff now doing or hitherto done within said state, or with residents, citizens or inhabitants thereof, is and has been done in manner and form as aforesaid, and plaintiff is informed and believes and upon information and belief says that said business is interstate intercourse, and is commerce among the several states and within the meaning of that clause of Article I of Section 8 of the Constitution of the United States which invests the Congress with power to regulate commerce among the several states.

Sixth. Nevertheless on, to-wit, the 8th day of March, 1883, the territorial legislature of the Territory of Montana passed an Act entitled "An Act regulating Insurance Companies," which
15 contained Section 37 in words and figures following, to-wit:

"SEC. 37. Each and every insurance company transacting business in this Territory shall be taxed upon the excess of premiums received over losses and ordinary expenses incurred within the Territory during the year previous to the year of listing in the county where the agent conducts the business, properly proportioned by the company at the same rate that all other personal property is taxed, and the agent shall render the list and be personally liable for the tax; and if he refuses to render the list, or to make affidavit that the same is correct to the best of his knowledge and belief the amount may be assessed according to the best knowledge and discretion of the assessor, and the county board of equalization may at their discretion, add fifty per cent. to the amount returned by the assessor. Insurance companies shall be subject to no other taxation under the laws of this Territory except taxes on real estate and the fees imposed by Section thirty-two of this Act. And all moneys received from such insurance companies in payment of taxes, as provided for in this section, shall be applied to the maintenance of the fire department of the town or city where such business shall be carried on, if there shall be such fire department there established; if not, then such moneys shall be paid into the general fund of such county."

Seventh. Said section 37 of said Act of 1883 became section 600 of the Compiled Statutes of Montana of 1887.

Eighth. In the Montana constitutional Codes and statutes of 1895 said section 37 which formed the aforesaid section 600
16 of said Compiled Statutes of 1887 was continued in said Code as section 681 but as so continued was in words and figures following, to-wit:

"SEC. 681. Each and every insurance corporation or company transacting business in this state must be taxed upon the excess of premiums received over losses and ordinary expenses incurred within the state during the year previous to the year of listing in the county where the agent conducts the business, properly proportioned by the corporation or company at the same rate that all other personal property is taxed, and the agent shall render the list, and be personally liable for the tax; and if he refuses to render the list, or to make affidavit that the same is correct to the best of his knowledge

and belief, the amount may be assessed according to the best knowledge and discretion of the assessor. Insurance companies and corporations are subject to no other taxation under the laws of this state, except on real estate, and the fees imposed by law."

Said section 681 now constitutes section 4073 of the Revised Codes of Montana, 1907.

Ninth. Said plaintiff did not have any property within said county at any time during the year 1910. Said plaintiff for and during said year 1909 paid without protest the tax imposed by section 4017 of the Revised Codes of Montana, which said tax aggregated the sum of $6,933.41, and down to July 1st, 1910, duly paid the two quarterly instalments called for by said section which aggregated $3,496.85. It also during said year paid to said state
17 licenses and fees aggregating the sum of, to-wit: $234.

Tenth. Nevertheless during the year 1909 the plaintiff received from policy holders residing within said Deer Lodge county premiums which aggregated the sum of $14,233.41. The insurance losses sustained by the plaintiff on policies on the lives of persons residing within said county during said year 1909 and the ordinary expenses incurred by the plaintiff in said county during said year aggregated the sum of $8,888.41. The excess of premiums so received over losses and ordinary expenses incurred within said county during said year was the sum of $5,345. In the year 1910 the county assessor of said county claiming to act by and under the pretended authority of said section 1073, placed said plaintiff on the assessment roll of said county as then and there the owner and possessor within said county of personal property of the amount and value of said sum of $5,345, and thereupon the taxing authorities of said county made a levy of thirty-nine mills upon each dollar of said valuation and assessment for said county and school purposes and then *and there* imposed a personal property tax against the plaintiff for said purposes amounting to the sum of $209.79 based upon said excess of premiums received over losses and ordinary expenses, and thereafter made demand upon said plaintiff for the payment of said tax; that on the —— day of ——, 1910, the plaintiff paid under protest to the county treasurer of said county said sum of $209.79. A copy of said protest is hereto attached marked "Exhibit A."

Eleventh. Said tax was and is illegal, unlawful and void
18 for that.

Said defendant was without jurisdiction to levy or collect said tax, and the levy and collection thereof was and is a burden upon interstate commerce contrary to Section 8 of Article I of the Constitution of the United States.

Wherefore said plaintiff demands judgment against said defendant for the sum of $209.79 with eight per cent. interest thereon from the 10th day of August 1910 and costs.

R. L. CLINTON,
JAMES H. McINTOSH,
Attorneys for Defendant.

(Verification.)

"EXHIBIT A."

To the County of Deer Lodge, Montana, and the Treasurer of said county:

New York Life Insurance Company, which is an insurance corporation organized under the laws of the state of New York for the purpose of and engaged in making insurance upon lives, and all and every insurance pertaining to life, issuing endowments, writing annuities, and executing trusts, having its principal office and place of business in the city of New York, in the state of New York, and now and for many years last past engaged at and from its said principal office and place of business in the city of New York, in the state of New York, in transacting its said business with residents, citizens and inhabitants of the state of Montana, now here pays under protest the sum of $209.79, claimed to have been
19 levied as a tax against it under and by virtue of section 4073 of the Revised Codes of Montana, 1907, and protests against said tax and objects to said payment, and as ground for its said protest and objection says that said tax is unconstitutional and void for that the same is a burden upon interstate commerce, and is contrary to and in violation of that clause of Section 8 of Article I of the Constitution of the United States which invests the Congress of the United States with power and authority to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

NEW YORK LIFE INSURANCE COMPANY.
(Signed.) By THOS. A. BUCKNER,
Its Vice-President.

Received the above protest and the said sum of $209.79 at the same time this 10th day of Aug. 1910.

W. J. GALLAGHER, *Treasurer.*
By JAS. H. MURPHY, *Deputy Treas.*

Filed September 8, 1910.

39

Demurrer to Complaint.

The above named defendant demurs to the complaint of the plaintiff in the above entitled action, for the following reasons and grounds of objection, to-wit:

(1) That said complaint does not state facts sufficient to constitute a cause of action.

W. H. TRIPPET,
County Attorney of Deer Lodge Co., Montana, and Attorney for Defendant.

Filed September 27th, 1910.

Copy of District Court Journal No. 9, Page 120.

FRIDAY, *this 30th day of December, A. D.*, 1910.

On this day counsel for the respective parties being present in court, it was agreed in open court, that the demurrer to the complaint heretofore set for hearing December 31st, 1910, should this day be submitted to the court for consideration and decision, and the same was so submitted, and the court having considered said demurrer sustains the same and thereupon counsel for the plaintiff announces in open court that plaintiff refuses to amend the complaint and that he will stand upon said complaint. Wherefore it is ordered and this does order that judgment be entered in favor of the defendant and against the plaintiff: that the plaintiff take nothing by its action herein and defendant have judgment for its costs incurred herein.

GEO. B. WINSTON, *Judge*.

21 *Judgment.*

It is ordered, adjudged and decreed that the plaintiff take nothing by its suit herein and that said action be dismissed.

Dated January 5th, 1911.

BARNEY HOGAN,
Clerk of the District Court of the Third Judicial District of the State of Montana in and for the County of Deer Lodge.

Filed January 5th, 1911.

Notice of Appeal.

To the County of Deer Lodge, State of Montana, Defendant, and T P. Stewart, County Attorney, for Defendant:

You, and each of you, take Notice: That the plaintiff New York Life Insurance Company hereby appeals to the supreme court of the State of Montana from the judgment duly made, given and entered in the above entitled cause and in the above entitled court, on the 5th day of January, 1911, in favor of the defendant in said action and against the said plaintiff; and the said plaintiff hereby appeals from the whole thereof.

R. L. CLINTON,
JAMES H. McINTOSH,
Attorneys for Plaintiff.

Service is hereby accepted and copy had this 25th day of February, 1911.

T. P. STEWART,
County Attorney in and for the County of Deer Lodge, State of Montana.

Filed February 25th, 1911.

22

Certificate of Clerk.

STATE OF MONTANA,
County of Deer Lodge, ss:

I, Barney Hogan, clerk of the district court of the Third Judicial District of the State of Montana, in and for the county of Deer Lodge, hereby certify that the foregoing transcript, pages 1 to 22 inclusive, exclusive of this, contains a full, true and correct copy of certain parts of the judgment roll, consisting of the following to-wit: the complaint, demurrer to complaint, order sustaining defendant's demurrer to complaint, and judgment, as the same appear on file and of record in my said office. I further certify that this transcript also contains a full, true and correct copy of Notice of Appeal, as the same appears on file and of record in my said office, save and except such formal parts as are omitted from all the papers in said transcript, pursuant to the rules of the Supreme Court. And I further certify that a good and sufficient undertaking on appeal in due form has been properly filed herein, by appellant.

Witness my hand and the seal of said district court this 8th day of March, A. D. 1911.

[SEAL.]

BARNEY HOGAN,
Clerk of the District Court of the Third Judicial District of the State of Montana, in and for Deer Lodge County.

23

Order for Judgment.

Minutes of Supreme Court, State of Montana, Twenty-seventh Day of March Term.

TUESDAY, *April 25th*, 1911.

Court convened pursuant to recess.

Present:

The Hon. Theo. Brantley, Chief Justice.
The Hon. Henry O. Smith, Associate Justice.
The Hon. William L. Holloway, Associate Justice.

And the following proceedings, among others, were had:

No. 2991.

EW YORK LIFE INSURANCE COMPANY, Plaintiff and Appellant,

vs.

DEER LODGE COUNTY, Defendant and Respondent.

This cause this day came on for the judgment and decision of the rt. Whereupon on consideration it is now here ordered and

adjudged by this court, that the judgment of the court below made and entered on the 5th day of January A. D. 1911 be and it is hereby affirmed, at the cost of the appellant. Opinion by Mr. Justice Smith. Mr. Chief Justice Brantley and Mr. Justice Holloway concurring.

Minutes of the day's proceedings signed by

THEO. BRANTLEY,
Chief Justice.

Attest:
JOHN T. ATHEY, *Clerk.*

24 No. 2991.

STATE OF MONTANA

In the Supreme Court, March Term, 1911

NEW YORK LIFE INSURANCE COMPANY, Plaintiff and Appellant,
v.
DEER LODGE COUNTY, Defendant and Respondent.

Submitted: April 8, 1911.
Decided: April 25, 1911.

Filed: April 25, 1911.
JOHN T. ATHEY, *Clerk.*
By W. O. CRAIG, *Deputy.*

25 Mr Justice SMITH delivered the opinion of the Court.

The plaintiff is a life insurance company incorporated under the laws of the state of New York, doing a general life insurance business in every country of the civilized world, including all of the states, territories and possessions of the United States. During the year 1909 it received from policyholders residing in Deer Lodge county in this state, premiums aggregating the sum of $14,233.41; the insurance losses sustained and the ordinary expenses incurred, in the county, during the year, amounted to $8,888.41; the excess of premiums over losses and ordinary expenses being the sum of $5,345. In the year 1910 the county assessor of the county, claiming to act by virtue of section 4073, Revised Codes, placed the plaintiff's name on the assessment roll as the owner of personal property in the said sum of $5,345, and thereupon the taxing authorities imposed a tax against it in the sum of $209.79, based upon said excess of premiums over losses and ordinary expenses. This latter sum it paid under protest, and this action was brought to recover the same. It is alleged in the complaint that "all the business of the plaintiff now doing or hitherto done with the state, or with residents, citizens or inhabitants thereof * * * is interstate intercourse and is commerce among the several states, within the meaning of that clause of section 8, Article I, of the Constitution of the United States which in-

vests the Congress with power to regulate commerce among
26 the several states * * * . Said tax was and is illegal,
unlawful and void for that said defendant was without jurisdiction to levy or collect said tax, and the levy and collection thereof was and is a burden upon interstate commerce." The district court of Deer Lodge county sustained a general demurrer to the complaint, whereupon plaintiff refused to further plead, and judgment was entered in favor of the defendant. The appeal is from the judgment. Appellant's contention is that the tax was illegal and void for the reasons set forth in the complaint.

Section 4073, Revised Codes, reads as follows: "Each and every insurance corporation or company transacting business in this state must be taxed upon the excess of premiums received over losses and ordinary expenses incurred within the state during the year previous to the year of listing in the county where the agent conducts the business, properly proportioned by the corporation or company at the same rate that all other personal property is taxed, and the agent shall render the list, and be personally liable for the tax; and if he refuses to render the list or to make affidavit that the same is correct, to the best of his knowledge and belief, the amount may be assessed according to the best knowledge and discretion of the assessor. Insurance companies and corporations are subject to no other taxation under the laws of this state, except taxes on real estate and the fees imposed by law."

Several paragraphs of the complaint are devoted to a narration of the manner in which the business of life insurance is carried on and transacted between the plaintiff and its policyholders. Among others we find paragraph 5, which we quote: "Said several policies provide for advances or loans to the policyholder on the pledge of the policy as security, and pursuant to said provision the plain-
27 tiff has outstanding advances or loans made to its policyholders in said state aggregating the sum of, to-wit, $432,878. For more than ten years last past the plaintiff has had outstanding advances or loans to policyholders in said state aggregating a large sum. Said loans have each and all been made by the policyholder transmitting to the Home Office of the plaintiff an application for the loan, which said application the plaintiff considered and acted upon at its Home Office, and if it accepted it the plaintiff made out at its Home Office a loan agreement which it forwarded by mail for execution, and after executing it the policyholder forwarded the loan agreement and the policy to the Home Office and on receipt thereof at its Home Office the plaintiff forwarded the proceeds of the loan by mail to the policyholder within said state, by the plaintiff's check drawn to the policyholder's order on its bank account in the city of New York. In this manner the plaintiff is continuously making advances to its policyholders in Montana."

Whether this and other paragraphs of the complaint were inserted in order to distinguish the case from that of Northwestern Mutual Life Ins. Co., v. Lewis & Clarke County, 28 Mont. 484, and other cases herein cited, we do not know. At the argument no suggestion that effect was advanced and we find nothing of it in the printed

brief. We shall therefore assume that the plaintiff company is engaged in the same general line of business as was the plaintiff in Northwestern Mutual Life Ins. Co. v. Lewis & Clarke County.

In Paul v. Virginia, 8 Wall. 168, 183, the supreme court of the United States, speaking through Mr. Justice Field, said: "Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity against loss (by fire), entered into between the corporations and the assured, for a considera-
28 tion paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not inter-state transactions, though the parties may be domiciled in different states." See, also, Ducat v. Chicago, 10 Wall. 410; Philadelphia Fire Ass'n v. New York, 119 U. S. 110; Hooper v. California, 155 U. S., 648; Nutting v. Massachusetts, 183 U. S., 553; and Western Union Tel. Co. v. Kansas, 216 U. S. 1-45; also the case of the New York Life Ins. Co. v. Cravens, 178 U. S. 389-401, where the court again said, in a cause in which this appellant was a party: "The business of insurance is not commerce."

But the question here involved has been decided in this state, in Northwestern Mutual Life Ins. Co. v. Lewis & Clarke County, supra, although it does not appear from the report of that decision that section 8, Article I of the federal Constitution was in terms invoked by the plaintiff. The court in that case said: "The legislature has the right to prescribe reasonable terms upon which foreign corporations may do business in this state. The character, kind and amount of business done by the company, as well as the situs of its tangible property, may be considered in applying the various systems of taxation. The franchise of a corporation is granted by the jurisdiction where the company is incorporated, and its situs is in the state or country of its origin; but before the company can do business in this state it must comply with the terms of the statute relating
29 thereto, and upon such compliance a certificate of authority is issued to it. It then stands, under this law, on the same footing with domestic companies, and is subject to the same taxation on the same class of property. This certificate of authority issued to a foreign insurance company confers upon such company a privilege or right not possessed or enjoyed by citizens generally, and not conferred upon it by its original franchise. This right or privilege so conferred is in that sense a franchise, and by it the company is authorized to establish, conduct and maintain an insurance business the value of which is ascertained in the manner prescribed by statute; that is "the excess of premiums over losses and ordinary expenses incurred." It applies only to business transacted within the state, and is not objectionable as interfering with interstate commerce."

We therefore hold that the life insurance business from which arose the excess of premiums over losses and ordinary expenses, upon which the assessor of Deer Lodge county levied a tax, is not interstate business, and is not commerce within the meaning of section 8, Article I of the federal Constitution.

The judgment is affirmed.

Affirmed.

HENRY C. SMITH,
Associate Justice.

We concur

THEO BRANTLY,
Chief Justice.

WM. L. HOLLOWAY,
Associate Justice.

30

Authentication of Record.

SUPREME COURT,
State of Montana, ss.

I, John T. Athey, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of New York Life Insurance Company, Plaintiff, v. Deer Lodge County, Defendant, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Helena, Montana, this 27th day of June, 1911.

[Seal Supreme Court, State of Montana.]

JOHN T. ATHEY,
Clerk Supreme Court of Montana.

1

In the Supreme Court of the State of Montana.

NEW YORK LIFE INSURANCE COMPANY, Plaintiff in Error,
vs.
DEER LODGE COUNTY, Defendant in Error.

Assignment of Errors.

Now comes New York Life Insurance Company, plaintiff in error, and respectfully submits that in the record, proceedings, decision, and final judgment of the Supreme Court of the State of Montana in the above entitled cause there is manifest error in this, to wit:

First. The Court erred in holding that the life insurance business from which arose the excess of premiums after losses and ordinary expenses on which the assessor of Deer Lodge County levied said tax is not interstate business and is not commerce within the meaning of Section 8 of Article I of the Federal Constitution.

Second. The Court erred in not holding that the defendant, Deer Lodge County, was without power, authority or jurisdiction to levy and collect the tax complained of in the plaintiff's complaint for that the levy and collection thereof was and is a burden upon interstate commerce and is therefore contrary to that clause of Section 8 of Article 1 of the Constitution of the United States which provides that the Congress shall have power to regulate commerce among the several States.

32 Third. The Court erred in affirming the judgment of the District Court of Deer Lodge County, whereas said Court should have reversed said judgment on the ground that the tax complained of was and is a burden upon interstate commerce and is therefore contrary to that clause of Section 8 of Article 1 of the Constitution of the United States which provides that the Congress shall have power to regulate commerce among the several States.

Wherefore said New York Life Insurance Company prays that the judgment and decision aforesaid may be reversed, annulled, and altogether held for naught, and that it may be restored to all things which it has lost by the action and because of said judgment and decision.

ROBERT LEE CLINTON AND
JAMES H. McINTOSH,
Attorneys for Plaintiff in Error.

33 [Endorsed:] No. 2991. In the Supreme Court of the State of Montana. New York Life Insurance Co., Plaintiff in Error, vs. Deer Lodge County, Defendant in Error. Assignment of Errors. Filed Jun- 17, 1911. John T. Athey, Clerk Supreme Court State of Montana. R. L. Clinton and James H. McIntosh, Attorneys for Plaintiff in Error.

34 In the Supreme Court of the State of Montana

NEW YORK LIFE INSURANCE COMPANY, Plaintiff and Appellant
vs.
DEER LODGE COUNTY, Defendant and Respondent

Petition for the Allowance of a Writ of Error in the Supreme Court of the United States.

To the Honorable Theo. Brantly, Chief Justice of the Supreme Court of the State of Montana:

The petition of New York Life Insurance Company respectfully shows that on the 25th day of April, A. D., 1911, the Supreme Court of the State of Montana rendered a final judgment against your petitioner in a certain cause therein pending, wherein said New York Life Insurance Company was plaintiff and appellant, and Deer Lodge County was defendant and respondent, by which said Supreme Court of Montana affirmed that judgment by which the District Court of Deer Lodge County, Montana, having sustained a general

demurrer to the plaintiff's complaint duly filed in said District Court against said Deer Lodge County, there and then entered final judgment in favor of said defendant, Deer Lodge County, unconditionally dismissing upon its merits the plaintiff's said complaint, and for costs, as will more fully appear by reference to the record and proceedings in said cause. That said Supreme Court is
35 the highest court of said State in which a decision in said suit could be had.

Your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error, under Section 709 of the Revised Statutes of the United States, because said plaintiff in said suit claimed a right, title, privilege and immunity under the Constitution of the United States, and particularly under Section 8 of Article 1 of the Constitution of the United States, and said decision in said cause was and is against said right, title, privilege and immunity especially set up and claimed by said New York Life Insurance Company under said Constitution, as appears by the record of the proceedings in said cause, which is herewith submitted.

Wherefore your petitioner prays the allowance of a writ of error returnable into the Supreme Court of the United States, and for citation and supersedeas; and your petitioner will ever pray.

NEW YORK LIFE INSURANCE COMPANY, *Petitioner.*
By ROBERT LEE CLINTON AND JAMES H. McINTOSH,
Its Attorneys.

The writ of error as prayed for in the foregoing petition is hereby allowed this 17 day of June A. D., 1911, the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of $500.

Dated at Helena this 17th day of June A. D., 1911.

THEO. BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

36 [Endorsed:] No. 2991. In the Supreme Court of the State of Montana. New York Life Insurance Co., Plaintiff and Appellant vs. Deer Lodge County, Defendant and Respondent. Petition for the Allowance of a Writ of Error in the Supreme Court of the United States. Filed Jun- 17, 1911. John T. Athey, Clerk Supreme Court, State of Montana. R. L. Clinton and James H. McIntosh, Attorneys for Plaintiff and Appellant.

37 In the Supreme Court of the State of Montana.

NEW YORK LIFE INSURANCE COMPANY, Plaintiff and Appellant,
vs.
DEER LODGE COUNTY, Defendant and Respondent.

Order Allowing Writ of Error to the Supreme Court of the United States.

The above entitled cause coming on to be heard upon the petition of New York Life Insurance Company, the appellant therein, for a writ of error to the Supreme Court of the United States from the Supreme Court of the State of Montana, and upon examination of said petition and the record in said proceedings,

It is ordered that a writ of error be and is hereby allowed to this Court from the Supreme Court of the United States, and that the bond presented by said petitioner be and the same is hereby approved.

THEO. BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

Dated at Helena, this 17 day of June, 1911.

38 [Endorsed:] No. 2991. In the Supreme Court of the State of Montana. New York Life Insurance Co., Plaintiff and Appellant vs. Deer Lodge County, Defendant and Respondent. Order Allowing Writ of Error to the Supreme Court of the United States. Filed June 17, 1911. John T. Athey, Clerk Supreme Court, State of Montana. R. L. Clinton and James H. McIntosh, Attorneys for Plaintiff and Appellant.

39 In the Supreme Court of the State of Montana.

NEW YORK LIFE INSURANCE COMPANY, Plaintiff and Appellant,
v.
DEER LODGE COUNTY, Defendant and Respondent.

Bond on Writ of Error.

Know All Men by These Presents: That we, New York Life Insurance Company, as principal, and National Surety Company, as surety, are held and firmly bound unto Deer Lodge County in the sum of Five Hundred Dollars ($500) to be paid to said obligee, its successors, representatives and assigns, to the payment of which, well and truly to be made, we bind ourselves and our successors jointly and severally by these presents.

Sealed with our seals and dated this 17th day of June, A. D. 1911.

Whereas, the above named New York Life Insurance Company, as plaintiff in error, hath prosecuted a writ of error in the Supreme

Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Montana,

Now Therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute said writ of error to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

[SEAL.] NEW YORK LIFE INSURANCE COMPANY.
By DARWIN P. KINGSLEY,
Its President.

40 Attest:
SEYMOUR M. POLLARD, *Secretary.*

[SEAL.] NATIONAL SURETY COMPANY.
By JOEL RATHBONE, *Vice President.*

Attest:
J. R. WELLS,
Assistant Secretary.

STATE, COUNTY AND CITY OF NEW YORK, *ss.*

On this 17th day of June, 1911, before me personally appeared the above named Darwin P. Kingsley, to me known, who being by me duly sworn, did depose and say that he resides in the city, county and state of New York; that he is the President of the above named New York Life Insurance Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is the true corporate seal of said New York Life Insurance Company, and that said seal was affixed to said instrument, and that he signed the name of said corporation and his own name thereto by due authority of the Board of Directors thereof.

In Witness Whereof I have hereunto set my hand and affixed my notarial seal at the city of New York this 17th day of June, 1911

[SEAL.] LOUIS H. COOKE,
Notary Public.

STATE, COUNTY AND CITY OF NEW YORK, *ss.*

41 On this 17th day of June, 1911, personally appeared before me Joel Rathbone, who being duly sworn, deposes and says that he is Vice-President of the above named National Surety Company, the corporation described in and which executed the above instrument as surety; that he knows the seal of said corporation; that the seal affixed to said instrument is the true corporate seal of said National Surety Company, and that said seal was affixed to said instrument, and that he signed the name of said corporation and his own name thereto by due authority of the Board of Directors thereof.

In Witness Whereof I have hereunto set my hand and affixed my notarial seal at the city of New York this 17th day of June, 1911.

[SEAL.] LOUIS H. COOKE,
Notary Public.

The above bond and the sureties thereon approved this 17th day of June, 1911.

THEO. BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

Filed June 17, 1911.

JOHN T. ATHEY,
Clerk Supreme Court of Montana.

42 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Montana before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between New York Life Insurance Company, as Plaintiff and Appellant, and Deer Lodge County, as Defendant and Respondent, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or
43 of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened to the great damage of the said New York Life Insurance Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 17th day of June, in the year of our Lord one thousand nine hundred and eleven.

[Seal United States Circuit Court, District of Montana, 1890.]

GEO. W. SPROULE,
Clerk of the Circuit Court of the United States for the District of Montana.

Allowed by
THEO. BRANTLY,
Chief Justice of the Supreme Court of Montana.

[Endorsed:] Filed Jun- 17, 1911. John T. Athey, Clerk Supreme Court, State of Montana.

44

Certificate of Lodgment.

SUPREME COURT, STATE OF MONTANA, *ss.*:

I, John T. Athey, clerk of the said court, do hereby certify that there was lodged with me as such clerk on the 17th day of June, 1911, in the matter of New York Life Insurance Company versus Deer Lodge County:

1. The original bond of which a copy is herein set forth.
2. One copy of the writ of error, as herein set forth.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Helena, Montana, this 27th day of June, 1911.

[Seal Supreme Court, State of Montana.]

JOHN T. ATHEY,
Clerk Supreme Court of Montana.

45

In the Supreme Court of the State of Montana.

NEW YORK LIFE INSURANCE COMPANY, Plaintiff in Error,
vs.
DEER LODGE COUNTY, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss.*:

To Deer Lodge County, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within forty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Montana, wherein New York Life Insurance Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ of error men-

tioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Theo. Brantly, Chief Justice of the Supreme Court of Montana, this 17 day of June in the year of our Lord one thousand nine hundred and eleven.

THEO. BRANTLY,
Chief Justice of the Supreme Court of Montana.

The defendant in error, Deer Lodge County, acknowledges due and legal service on it of the above citation this 17th day of June, 1911.

DEER LODGE COUNTY,
By ALBERT J. GALEN,
Attorney General for Montana,
Its Attorney.

46 [Endorsed:] No. 2991. In the Supreme Court of the State of Montana. New York Life Insurance Co., Plaintiff in Error, vs. Deer Lodge County, Defendant in Error. Citation. Filed Jun- 17, 1911. John T. Athey, Clerk Supreme Court, State of Montana. R. L. Clinton and James H. McIntosh, Attorneys for Plaintiff in Error.

47 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Montana, ss.

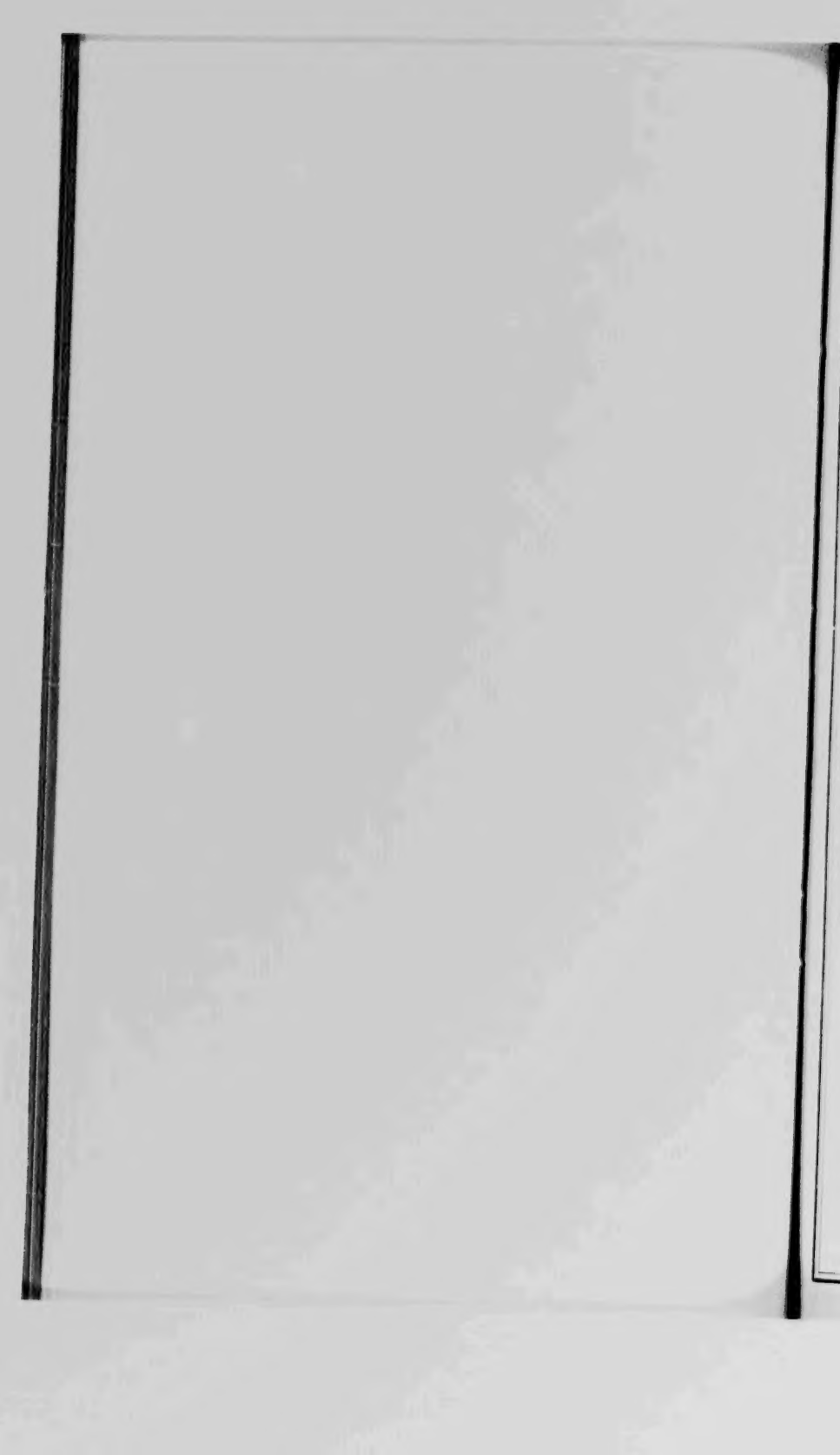
In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I have hereunto subscribed my name, and affixed the seal of said Supreme Court of Montana, in the City of Helena, this 27th of June, 1911.

[Seal Supreme Court, State of Montana.]

JOHN T. ATHEY,
Clerk Supreme Court of Montana.

Endorsed on cover: File No. 22,801. Montana Supreme Court. Term No. 383. New York Life Insurance Company, plaintiff in error, vs. Deer Lodge County. Filed July 15th, 1911. File No. 22,801.



Office Supreme Court U. S.
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Supreme Court of the United States

OCTOBER TERM, 1913.

No. 56.

NEW-YORK LIFE INSURANCE CO.,
Plaintiff-in-Error,

against

DEER LODGE COUNTY,
Defendant-in-Error.

Brief for Plaintiff-in-Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

ROSCOE POUND,
ROBERT L. CLINTON, and
JAMES H. McINTOSH,
Attorneys for Plaintiff-in-Error.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 56.

NEW-YORK LIFE INSURANCE COMPANY, Plaintiff in Error, vs. DEER LODGE COUNTY,	*In error to the Supreme Court of Montana.*

BRIEF OF THE PLAINTIFF IN ERROR.

BRIEF STATEMENT OF THE ISSUE.

May it Please the Court,

This is a writ of error to the Supreme Court of Montana (the highest court of that state) brought to obtain reversal of a judgment of that court affirming a judgment of the District Court of the Third Judicial District, sustaining a demurrer of the defendant in error, defendant in that court, to the complaint of the plaintiff in error, plaintiff in that court, and rendering final judgment for the defendant upon plaintiff's refusal to plead over.

The action is in the nature of one for money had and received to recover certain moneys exacted of and paid under protest by the plaintiff as taxes claimed to have been levied against the plaintiff, under § 4073, Revised Codes of Montana, 1907. The ground of the protest (p. 9) was, that the pretended tax was unconstitutional and void as a burden upon interstate commerce, and was contrary to and in violation of Section 8 of Article I of the Federal Constitution.

STATEMENT OF THE FACTS.

As the cause was disposed of upon demurrer, the complaint may, for the convenience of the court, be set forth in full as a statement of the case.

THE COMPLAINT ALLEGES:

"*First.*—That said plaintiff, New York Life Insurance Company, now is and ever since the year 1845 has been a corporation duly organized and existing under and by virtue of the laws of the state of New York for the purpose of and engaged in transacting the business of insurance on lives and all and every insurance pertaining to life and receiving and executing trusts and making endowments, with its domicile, principal office and place of business in the city of New York in the state of New York; that said plaintiff calls its said principal office in the city and state of New York its Home Office and in this complaint Home Office means said principal office in the city and state of New York; that said plaintiff for many years last past has been engaged in transacting its said business on a large scale with persons residing in every country of the civilized world, and in all the states, territories, districts and possessions of the United States.

"*Second.*—That the defendant, Deer Lodge County, is a political subdivision of the state of Montana, organized

as a county under and by virtue of the constitution and laws of said state.

"*Third.*—That in the year 1869 said plaintiff commenced to transact its said business with residents, citizens and inhabitants of the territory of Montana, and continued uninterruptedly to do so during the remaining existence of the territory and from the inception of the state of Montana until the present time, and is still so engaged therein; that in the year 1883 there existed contracts of life insurance made and entered into between the plaintiff of the one part and several residents, citizens and inhabitants of said territory of the other part aggregating the sum of, to wit, $600,000, which called for premium payments aggregating, to wit, $20,800 annually; that the amount of said outstanding insurance contracts between the plaintiff and several residents, citizens and inhabitants of said territory and state has progressively increased and amounted to the respective sums and called for premium payments annually in the several years below named as follows, to wit,—

Year	Total insurance in force in Montana	Calling for premiums aggregating annually
1893	$3,582,272	$109,429.00
1895	3,729,927	112,152.00
1897	4,861,608	150,388.00
1907	10,089,370	343,545.00
1909	10,023,445	343,664.93

"That said total insurance is made up of several policy contracts averaging, to-wit, $2,000 each; that *said several policy contracts are subject to sale, assignment and transfer, and to use as collateral security and for other commercial purposes, and they are a common subject of sale, assignment and transfer, and of use as collateral security, and for other commercial uses*, and are valuable for each and all of said purposes, and for other general purposes of trade and commerce.

"*Fourth.*—That said business is now being and always has been done and carried on through the agencies and in manner following, to wit:

"(*a*) Said plaintiff now has and ever since the year 1869 has had in its employ in said territory and state special agents authorized to solicit applications for insurance, to collect the first premium and to deliver the policy on applications taken by them, provided the Company after considering such applications at its said Home Office prepared and transmitted the policy to such agent for said purpose. The several employment contracts of said agents were made in writing directly with the Home Office and did not take effect until they were countersigned by the contract registrar of the plaintiff at its Home Office.

"(*b*) The plaintiff also now has and for more than fifteen years last past has had in its employ in said state a person known as Agency Director who was employed by contract in writing directly with the Home Office through the mails, and whose authority is limited to supervising the work of the soliciting agents, to recommending to the Home Office the employment of persons who desire to become soliciting agents for the plaintiff, and to soliciting applications for new insurance.

"(*c*) The plaintiff has and ever since the year 1869 has had in its employ in said territory and state sundry physicians and surgeons called Medical Examiners appointed by the proper officers of the plaintiff at its Home Office, their said employment having been negotiated and made by correspondence through the mails. The authority of said Medical Examiners was and is limited to making physical examinations of applicants for insurance, to recording the results of such examinations, and to transmitting their said reports as such Medical Examiners to the plaintiff's Home Office, where alone a rating is put upon the risk and the applicant's insurability passed upon and determined. If the Medical Ex-

aminer's report is incomplete or further information is required, the Home Office obtains further information by correspondence through the mails and by express. No Medical Examiner in Montana has ever been authorized to accept or decline a risk. This is and always has been done at the Home Office, based upon the data obtained as aforesaid and upon other facts similarly obtained.

"(d) Said plaintiff also has and for more than fifteen years last past has had in its employ in said state in various localities a confidential employee called an Inspector who is employed directly from the Home Office, whose employment is intended to be secret, and whose duty it is to furnish, and who does furnish, the plaintiff at its Home Office by mail information about the habits, character, standing and other elements of moral hazard of persons applying to the plaintiff for insurance on their lives.

"(e) Said plaintiff now maintains and for more than five years last past has maintained in the city of Butte in said state an office which is in the immediate charge of an employee who is appointed from the Home Office and known as Cashier. The authority of said Cashier is limited to making and supervising the making of such records as the business of said office requires, to receiving from soliciting agents and from Medical Examiners within said state applications for new insurance and medical examinations solely for transmission to the Home Office of the plaintiff, to receiving from the plaintiff's Home Office the report of its action on such applications, to receiving from said Home Office and transmitting to the soliciting agent who took the application new policies of insurance, to receiving such premiums as are paid on new policies issued on the lives of persons residing or being within said state and as are not transmitted directly to the Home Office, to mailing to the persons residing within said state such premium notices as the plaintiff makes out at its Home Office and sends to said Cashier for that purpose,

to receiving renewal premiums from policy-holders within said state whenever such Cashier is specially authorized by the Home Office to do so and the policy holders elect to pay them there instead of remitting directly to the Home Office where all premiums are by the terms of the policy contracts made payable, to depositing said premiums to the credit of the plaintiff in bank in Butte to be drawn upon not by him but by the plaintiff from its Home Office on Thursday of each week, to notifying the Home Office daily of the sum that day deposited by him in bank, and to keeping account of the insurance obtained by the several soliciting agents in said state and, under the direction of the Home Office, settling with such agents their commissions earned in obtaining new insurance. Said plaintiff has never had any office or place of business for any purpose within said territory or state except said office in the city of Butte and except also an office with like powers, duties and authority in the city of Helena, which however is abandoned and closed, to-wit, five years ago.

The foregoing are all the agents, agencies or representatives of any and every kind the plaintiff has or ever has had within said state.

It is and always has been the custom and practice of the plaintiff to prepare at its Home Office and transmit, and it does prepare and transmit, to its several said employees within said state, forms for use in the several transactions in which said employees are authorized as aforesaid to engage, and the plaintiff keeps its said several employees supplied from its Home Office through the mails or by express with such forms.

No agent or representative of the plaintiff in Montana has ever been authorized to accept risks of any kind, or to make, modify or discharge contracts, nor has any agent or representative of the plaintiff within said state ever done any of said things. All the officers of the plaintiff reside and have always resided in and near

the city of New York and had their several offices and places of business at said Home Office, except one of them who resides in Paris, France, and has his office and place of business there, and no one of them has ever resided or had a place of business in Montana. All risks are, and always have been, accepted and contracts made, modified and discharged by the officers of the plaintiff at its Home Office and not elsewhere. Said risks and contracts with policy holders residing or being within the state of Montana have each and all been negotiated and the several contracts made, modified continued and performed in manner following, to wit:

"(1) When one of said soliciting agents takes an application for insurance he takes it in writing on a form prepared at the Home Office and transmitted to such agent for said purpose. The applicant is then physically examined by one of the plaintiff's said local Medical Examiners who reduces said examination to writing on a form prepared by the plaintiff at its Home Office and transmitted to said examiner for said purpose. After such medical examination is made and reduced to writing as aforesaid and signed by the applicant and the examiner, then said application and said Medical Examiner's report are transmitted from said state to the Home Office of the plaintiff in New York for consideration. If the plaintiff at its Home Office after there examining and considering said application and Medical Examiner's report is satisfied with the risk, it then and there writes up a policy contract in accordance with said application and forwards it through the mails to said state, and if the Inspector's report when received is found to be satisfactory, the plaintiff then directs the delivery of the policy and collection of the first premium. Said first premium, if not remitted directly to the Home Office by the policy holder, is delivered to the plaintiff's Cashier at Butte and is by him deposited in bank to the credit of the plaintiff and is drawn out of said bank by draft drawn

by two officers of the plaintiff at its Home Office on Thursday of each week.

"(2) Said policies each and all, in consideration of the payment of the premiums called for therein, obligate the plaintiff to pay the amount of insurance therein named at the Home Office of the Company in the city of New York upon receipt at said Home Office of satisfactory proofs of the death of the person named therein as the insured. They also each and all provide that all premiums are payable in advance at said Home Office or to an agent of the Company upon delivery on or before the due date of the premium of a receipt signed by the President, a Vice President, a Second Vice President, a Secretary or the Treasurer of the Company, each and all of whom are officers of said plaintiff. Said policies also each and all provide that no agent has authority to waive forfeitures, to make, modify or discharge contracts, or to extend the time for paying a premium; that none of these things can be done except by an officer of the plaintiff at its Home Office.

"(3) At least fifteen and not more than forty-five days before the maturity of each premium, the plaintiff mails to the policy-holder a notice advising him of the due date of the premium, the amount to be paid, and stating therein that the same must be paid to the plaintiff at its Home Office or to the Cashier of its office in Butte on or before the due date, otherwise the policy will be forfeited and void. The plaintiff prepares and checks up said premium notices at its Home Office and transmits them by express to its office in Butte, where they are again checked up and mailed to the several policy-holders.

"(4) Said policy-holders pay their premiums either directly to the Home Office through the mails or to the Cashier of the plaintiff's office at Butte. If payment is made to the Cashier of the plaintiff's office at Butte, said Cashier at once deposits the same in bank to the credit of the plaintiff's account and daily transmits through the

mails to the Home Office notice of the several sums by him that day received and deposited in bank. On Thursday of each week two officers of the plaintiff at its Home Office draw a draft for the full sum accumulated in bank to the plaintiff's credit as aforesaid, which said draft is transmitted through the mails and returns thereon are duly received by plaintiff at its Home Office through the mails. No person in said state has ever had power or authority to draw on said bank account. The plaintiff keeps another bank account in said city which is limited to a maximum credit balance of $500 on which alone said Cashier is authorized to draw checks and which is used solely for paying the current expenses incident to the maintenance of said office in Butte.

"(5) Said several policies provide for advances or loans to the policy-holder on the pledge of the policy as security, and pursuant to said provision the plaintiff has outstanding advances or loans made to its policy-holders in said state aggregating the sum of, to-wit, $432,878. For more than ten years last past the plaintiff has had outstanding advances or loans to policy-holders in said state aggregating a large sum. Said loans have each and all been made by the policy-holder transmitting to the Home Office of the plaintiff an application for the loan, which said application the plaintiff considered and acted upon at its Home Office, and if it accepted it the plaintiff made out at its Home Office a loan agreement which it forwarded by mail for execution and after executing it the policy-holder forwarded the loan agreement and the policy to the Home Office and on receipt thereof at its Home Office the plaintiff forwarded the proceeds of the loan by mail to the policy-holder within said state by the plaintiff's check drawn to the policy-holder's order on its bank account in the city of New York. In this same manner the plaintiff is continuously making advances to its policy-holders in Montana.

"(6) When a policy matures as an endowment, the sum

to be paid is calculated by the plaintiff at its Home Office and a check for the amount thereof is drawn to the order of the policy-holder on the plaintiff's bank account in the city of New York and is sent to the policy-holder through the mails and is by him duly endorsed and deposited in bank in Montana, which in turn transmits it to New York for collection and credit or return.

"(7) Proofs of death are made on blanks prepared by the plaintiff at its Home Office in New York and transmitted to the claimant for the purposes of preparing such proofs, and after completing them the beneficiary transmits them through the mails to the plaintiff at its Home Office where they are examined, and if found to be satisfactory the plaintiff pays the loss at its Home Office by drawing a check to the order of the beneficiary on its bank account in the city of New York, which said check it transmits through the mails to such beneficiary in the state of Montana, who on receipt thereof forwards to the plaintiff the policy together with receipt for its proceeds and deposits the check in bank which collects the amount of the check as in the case of the payment of matured endowments.

"*Fifth.*—All the business of the plaintiff now doing or hitherto done within said state, or with residents, citizens or inhabitants thereof, is and has been done in manner and form as aforesaid, and plaintiff is informed and believes and upon information and belief says that said business is interstate intercourse, and is commerce among the several states and within the meaning of that clause of Article I of Section 8 of the Constitution of the United States which invests the Congress with power to regulate commerce among the several states.

"*Sixth.*—Nevertheless on, to-wit, the 8th day of March, 1883, the territorial legislature of the territory of Montana passed an Act entitled 'An Act regulating Insurance Companies', which contained Section 37 in words and figures following, to-wit,—

"'SEC. 37. Each and every insurance company transacting business in this territory shall be taxed upon the excess of premiums received over losses and ordinary expenses incurred within the territory during the year previous to the year of listing in the county where the agent conducts the business, properly proportioned by the company at the same rate that all other personal property is taxed, and the agent shall render the list and be personally liable for the tax; and if he refuses to render the list, or to make affidavit that the same is correct to the best of his knowledge and belief, the amount may be assessed according to the best knowledge and discretion of the assessor, and the county board of equalization may, at their discretion, add fifty per cent. to the amount returned by the assessor. Insurance companies shall be subject to no other taxation under the laws of this territory except taxes on real estate and the fees imposed by Section thirty-two of this Act. And all moneys received from such insurance companies in payment of taxes, as provided for in this section, shall be applied to the maintenance of the fire department of the town or city where such business shall be carried on, if there shall be such fire department there established; if not, then such moneys shall be paid into the general fund of such county.'

"*Seventh.*—Said section 37 of said Act of 1883 became section 600 of the Compiled Statutes of Montana of 1887.

"*Eighth.*—In the Montana constitutional Codes and statutes of 1895 said section 37 which formed the aforesaid section 600 of said Compiled Statutes of 1887 was continued in said Code as Section 681, but as so continued was in words and figures following, to-wit:

"'SEC. 681. Each and every insurance coporation or company transacting business in this state must be taxed upon the excess of premiums received over losses and ordinary expenses incurred within the state during the year previous to the year of listing in the county where the

agent conducts the business, properly proportioned by the corporation or company at the same rate that all other personal property is taxed, and the agent shall render the list, and be personally liable for the tax; and if he refuses to render the list, or to make affidavit that the same is correct to the best of his knowledge and belief, the amount may be assessed according to the best knowledge and discretion of the assessor. Insurance companies and corporations are subject to no other taxation under the laws of this state, except on real estate, and the fees imposed by law.'

"Said Section 681 now constitutes Section 4073 of the Revised Codes of Montana, 1907.

"*Ninth.*—Said plaintiff did not have any property within said county at any time during the year 1910. Said plaintiff for and during said year 1909 paid without protest the tax imposed by section 4017 of the Revised Codes of Montana, which said tax aggregated the sum of $6,963.41, and down to July 1, 1910, duly paid the two quarterly instalments called for by said section which aggregated $3,496.85. It also during the said year paid to said state licenses and fees aggregating the sum of, to wit, $234.

"*Tenth.*—Nevertheless during the year 1909 the plaintiff received from policy-holders residing within said Deer Lodge County premiums which aggregated the sum of $14,233.41. The insurance losses sustained by the plaintiff on policies on the lives of persons residing within said county during said year 1909 and the ordinary expenses incurred by the plaintiff in said county during said year aggregated the sum of $8,888.41. The excess of premiums so received over losses and ordinary expenses incurred within said county during said year was the sum of $5,345. In the year 1910 the county assessor of said county, claiming to act by and under the pretended authority of said Section 4073, placed said plaintiff on the assessment roll

of said county as then and there the owner and possessor within said county of personal property of the amount and value of said sum of $5,345, and thereupon the taxing authorities of said county made a levy of thirty nine mills upon each dollar of said valuation and assessment for said county and school purposes and there and then imposed a personal property tax against the plaintiff for said purposes amounting to the sum of $209.79, based upon said excess of premiums received over losses and ordinary expenses, and thereafter made demand upon said plaintiff for the payment of said tax; that on the —— day of ——, 1910, the plaintiff paid under protest to the county treasurer of said county said sum of $209.79. A copy of said protest is hereto attached marked 'Exhibit A'.

"*Eleventh.*—Said tax was and is illegal, unlawful and void for that,

"Said defendant was without jurisdiction to levy or collect said tax, and the levy and collection thereof was and is a burden upon interstate commerce contrary to Section 8 of Article I of the Constitution of the United States.

"Wherefore said plaintiff demands judgment against said defendant for the sum of $209.79, with eight per cent. interest thereon from the 10th day of August, 1910, and costs."

A Copy of the protest referred to in the complaint is made a part thereof and appears upon page 9 of the printed record.

II.

Summary of the Facts.

Summarizing these facts, the court will notice that the plaintiff transacts its business at its Home Office in New York; that it maintains no general agents or agency in

Montana, but only special agents (solicitors), Medical Examiners, Inspectors and a Cashier, all with strictly limited authority; that all risks are assumed and policies issued in New York; that all losses and premiums are payable and paid in New York, by checks upon New York banks sent by mail to Montana and by remittance from the policy-holders to New York, either directly or by payment to a Cashier in Montana who has no control over the money but deposits it daily in a bank from which the Home Office in New York draws the money by draft weekly; that the policies issued by the plaintiff in New York and by it sent to residents and inhabitants of Montana, are subject to sale, assignment and transfer, use as collateral security and other commercial purposes in Montana and elsewhere, and are commonly so used; that the plaintiff from New York loans large sums of money annually to its policy-holders in Montana upon pledge of such policies; that in the course of said business large sums of money annually pass from Montana to New York by way of premiums and from New York to Montana as losses, payment of matured endowments and loans on the security of policies; that all of this business is done with citizens or residents or inhabitants of Montana by the Home Office in New York, through the mails or by express; that the ordinary course of such business involves transmission from Montana to New York of applications for insurance, reports of Medical Examiners, applications for loans, proofs of loss, and premiums both through direct remittance by policy-holders in Montana to the Home Office and through payment to the Cashier at Butte, deposit of the money by the latter, and draft drawn upon the deposit by the Company in New York, and transmission from New York to Montana of appointments of special agents, Agency Directors, Medical Examiners, Inspectors and Cashiers and blanks for their use, of requests for further information in cases of medical examinations, of policies, of premium notices, of loan contracts, and of moneys in the way of loans upon

policies, payment of matured endowments and payment of death losses.

In short, this entire business, from the employment of the soliciting agent to the final payment of the death loss, is interstate business transacted through the mails or by express between the Home Office in New York and residents of Montana.

III.

The Demurrer.

The defendant's demurrer, which the court sustained, was based on the ground (p. 9) "That said complaint does not state facts sufficient to constitute a cause of action".

IV.

The statute under which the tax was imposed.

Section 4073, Revised Codes of Montana (1907), under which the pretended tax was levied, reads as follows:

"Each and every insurance corporation or company transacting business in this state must be taxed upon the excess of premiums received over losses and ordinary expenses incurred within the state during the year previous to the year of listing in the county where the agent conducts the business, properly proportioned by the corporation or company at the same rate that all other personal property is taxed, and the agent shall render the list and be personally liable for the tax . . . ."

V.

The Montana Supreme Court construed said statute as imposing a tax upon the privilege of doing business in the State.

It will be seen from the opinion of the Supreme Court of Montana (p. 14) and from the case of *Northwestern Mutual Life Insurance Co. v. Lewis & Clark County*, 28 *Mont.* 484, cited and relied on therein, that the court held that the business done in the manner described in the complaint was not interstate commerce, and that the tax imposed is regarded as a condition imposed by the state upon the company as a pre-requisite of its carrying on this course of business with citizens of the state. In other words, Montana claims the power to cut off or to obstruct at its pleasure the course of interstate business set forth in the complaint. Having already exacted a license fee and imposed a tax upon the property of the company in the jurisdiction, the state has sought as a condition of doing the business at all to impose a tax upon this business between Montana and New York, measuring such pretended tax by the amount of money annually withdrawn from the state in the course thereof in excess of the amount returned to the state in the form of expenses and losses paid.

ERRORS RELIED UPON.

The plaintiff claims that the court erred,—

First.—In holding that the life insurance business from which arose the excess of premiums over losses and ordinary expenses on which the assessor of Deer Lodge County levied said tax is not interstate business and is not commerce within the meaning of Section 8 of Article 1 of the Federal Constitution.

Second. In not holding that the defendant, Deer Lodge County, was without power, authority or jurisdiction to levy and collect the tax complained of in the plaintiff's complaint for that the levy and collection thereof was and is a burden upon interstate commerce and is therefore contrary to that clause of Section 8 of Article 1 of the Constitution of the United States which provides that the Congress shall have power to regulate commerce among the several states.

Third.—In affirming the judgment of the District Court of Deer Lodge County, whereas said court should have reversed said judgment on the ground that the tax complained of was and is a burden upon interstate commerce and is therefore contrary to that clause of Section 8 of Article 1 of the Constitution of the United States which provides that the Congress shall have power to regulate commerce among the several states.

ARGUMENT.

I.

The case at bar is wholly different from the prior cases decided by this Court in which insurance has been held not to be within the purview of the commerce clause of the Constitution.

In common with the prior cases decided by this court, in which insurance was held not to be within the purview of the commerce clause of the Federal Constitution, this case involves the transaction of business by an insurance company. But otherwise, and in the decisive features of the case, they are quite distinct. In the case at bar the essential point is, not that the insurance business is the source of the transactions in question, but that the state is obstructing business that is wholly interstate business.

That the cases in question do not establish that every-

thing that is done by an insurance company is necessarily and inevitably, for that simple reason, to be excluded from the category of commerce, was recognized in *Liverpool Ins. Co. v. Massachusetts*. In the opinion in that cause MR. JUSTICE MILLER says, —

> "The case of *Paul v. Virginia* decided that the business of insurance, *as ordinarily conducted*, was not commerce, and that a corporation of one state, having an agency by which it conducted that business in another state, was not engaged in commerce between the states."

Liverpool Insurance Co. v. Massachusetts, 10 *Wall.*, 566, 573.

It becomes proper, therefore, to examine these prior cases critically in order to perceive what questions were involved and how they were determined, to compare the facts of those cases with those of the case at bar, and to examine whether the conclusions reached have any application to this controversy.

In *Paul v. Virginia*, 8 *Wall.*, 168, Paul was the agent in Virginia of several fire insurance companies incorporated in New York. The statute of Virginia provided that no insurance company not incorporated under the laws of the state should carry on business within the state until it had deposited certain bonds with the state treasurer. Paul applied for a license but refused to comply with the provisions of the statute with respect to the deposit of bonds. The court held (1) that a corporation is not a citizen within the purview of the clause of the Constitution respecting privileges and immunities of citizens in the several states, and (2) that the issuing of policies of fire insurance is not commerce. Bearing in mind what was before the court, the argument upon the latter proposition reveals at once a situation wholly distinct from the one now before the court.

Mr. Justice Field there said,—

> "The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York while in Virginia would constitute a portion of such commerce."

Paul v. Virginia, 8 *Wall*, 168, 183.

Here the court makes three controling points which deserve to be compared with the case at bar.

(1) It is said the policies are simple contracts of indemnity entered into by the company for a consideration paid by the assured. In other words, they are unilateral contracts whereby the company, in consideration of money paid to it in Virginia, agrees to indemnify the assured by paying money to him in Virginia in case of loss. Hence no course of interstate business, including also the transmission of money from Virginia to New York and from New York to Virginia, was involved. In the case at bar the contracts are bilateral. They do not stop with a payment of a single premium once for all, but the assured agrees to pay a premium annually during the

term of the policy and agrees to pay these premiums in New York. Again, the company agrees to make loans upon the security of the policy as well as to pay matured endowments and the amount of the policy upon death of the assured, and all of these are payable and paid by check on a New York bank, transmitted to Montana. In other words, the contracts here, resulting as they do from interstate negotiations and intercourse, provide for and require a regular course of interstate business, including the transmission of money from Montana to New York and *vice versa*.

(2) It is said that the policies are not articles of commerce. This was true of the policies involved in *Paul v. Virginia*. Fire insurance policies are not assignable and are not articles of commerce. Prior to loss, the policy cannot be pledged or be put to any commercial use. In this case, on the other hand, it is expressly alleged, and the demurrer admits, that the policies "are subject to sale, assignment and transfer and to use as collateral security and for other commercial purposes, and they are a common subject of sale, assignment and transfer and of use as collateral security and for other commercial purposes" (p. 2). This is alleged as a fact. It is not a mere conclusion of law. Moreover, apart from the facts as to the policies issued by the plaintiff company, the distinction between fire policies and life policies is settled.

> "A policy of life insurance, without restrictive words, is assignable by the assured for a valuable consideration equally with any other chose in action, where the assignment is not made to cover a mere speculative risk, and thus evade the law against wager policies."

New York Mutual Life Ins. Co. v. Armstrong, 117 U. S., 591, 597.

(3) It is said that the policies do not take effect until delivered by the local agent and that they are then local

transactions. Obviously this is written with respect to such a case as *Paul v. Virginia* in fact was,—the case of a local recording agent of a fire insurance company, *with authority to assume risks and to make, countersign and issue policies*. In such a case the foreign company undoubtedly contracts in the locality. The premium is paid to the local agent who accounts for it to the company, and the local agent makes the contract for the company then and there. Mr. Justice Field's argument is apt enough to such a course of business.

Here, however, we have contracts made between the assured in Montana and the company in New York, no one in Montana having any authority or undertaking to assume a risk; we do not have contracts concluded by the payment of one premium once for all, but instead we have contracts in which a long series of annual premiums is provided for; and, finally, these annual premiums are payable, not to an agent with general powers in Montana, but to the company at its Home Office in New York, so that a course of transmission of money from the one state to the other is provided for and is required. In *Paul v. Virginia*, the state prescribed the terms upon which an intrastate business might be done within its limits. Not a penny needed to go out of the state, nor was it needful for anything to come into the state, in order to do all that was done. In the case at bar, the entire transaction is interstate business; none of it is intrastate business.

Ducat v. Chicago, 10 *Wall.*, 410, was treated by the court (p. 415) as on all fours with *Paul v. Virginia*. So far as the character of the business done by the companies in question goes, it was evidently the same case. The only difference was that in *Ducat v. Chicago*, over and above license fees, the companies were taxed upon premiums received in the state. All that was said above in connection with *Paul v. Virginia* applies equally to *Ducat v. Chicago*. No course of business between the states was shown. As is usual in fire insurance,

the contracts were made with, and the premiums were paid to, local agents with general authority. Indeed it is common knowledge that in fire insurance the local recording agent often gives credit, the company looking to the personal liability of its agent, and payment of the premium is not a condition precedent nor is non-payment a ground of forfeiture.

Church v. La Fayette F. I. Co., 66 *N. Y.*, 22.

White v. Connecticut F. I. Co., 120 *Mass.*, 330.

Baker v. Westchester F. I. Co., 162 *Mass.*, 358.

Carson v. Jersey City I. Co., 43 *N. J. Law*, 300.

Gaysville Mfg. Co. v. Phoenix Mutual F. I. Co., 67 *N. H.*, 457.

Hence in *Ducat v. Chicago* there is no course of interstate business requiring transmission to another state, as in the case at bar where no one in Montana can give credit, or make, modify, or discharge any contract for or with the Company, but premiums are payable in New York and are either remitted to the Home Office directly by the insured, or, if paid to the Cashier at Butte, are deposited by him to the credit of the Company and withdrawn by draft and taken by the Company to New York each week. In other words, in *Ducat v. Chicago*, the state of Illinois taxed the money and choses in action (in the form of indebtedness for premiums received or premiums for which credit had been given owing by their agents) which the companies held in that state. In the case at bar the Company has no moneys or choses in action of the sort in Montana. The premiums are payable in New York, and the state is taxing the Company for the privilege of transacting an interstate business.

Liverpool Insurance Co. v. Massachusetts, 10 *Wall*, 566, involves the same sort of tax as that in *Ducat v. Chicago*. The company was engaged in fire and marine insurance.

As it was an English company, obviously what has just been said with reference to the course of business in the latter case must apply even more. It is not claimed that premiums were payable or risks assumed at the office in England. Mr. Justice Miller, in rendering the opinion of the court, was careful to limit the remarks of Mr. Justice Field in *Paul v. Virginia* to the "business of insurance *as ordinarily conducted*" (p. 573). The chief question in *Liverpool Insurance Co. v. Massachusetts* was, whether the company was a corporation within the rule in *Paul v. Virginia*.

In *Philadelphia Fire Ass'n v. New York*, 119 *U. S.*, 110, the plaintiff was a Pennsylvania fire insurance corporation doing business in New York through an agency in that state. The cause was heard upon an agreed case and all that was said as to the mode of doing business is to be found on p. 111, as follows,—

> "The defendant, the Fire Association of Philadelphia, is a corporation created and organized in the year 1820, by and under the laws of the state of Pennsylvania, for the transaction of the business of fire insurance, and having its principal place of business in the city of Philadelphia. In the year 1872 it established an agency in the State of New York, which it has ever since maintained."

It is evident that this was the same course of business as that involved in *Paul v. Virginia*. The principal question in the case had reference to discrimination against foreign corporations, and a claim to equal protection of the laws. Mr. Justice Harlan dissented.

In *Hooper v. California*, 155 *U. S.*, 648, Hooper was prosecuted for procuring insurance for a resident of California in an insurance company not incorporated under the laws of that state, which had not been admitted to do business therein. The facts were that he was a broker and that he procured marine insurance for a resident of California in a marine insurance company of

Massachusetts. The court considered that the facts showed a doing of business in California by the Massachusetts corporation without a license and contrary to the laws of California. It will be noted that here, as in *Paul v. Virginia*, each insurance involved a single transaction of payment of premium and delivery of the policy in California. There was no course of interstate business involving the making and transmission of contracts, premiums, and policy proceeds from one state to another. Hence as there was but the one transaction, namely, making within the state the unilateral contract of insurance, the court's first point was that the contract was made in California by the broker as agent of the company. Accordingly, MR. JUSTICE WHITE said,—

> "In the argument at bar it is admitted that, if the contract is to be considered as made in California, then this case is governed by the foregoing principles [*i. e.* that a state may exclude foreign corporations, or may prescribe the terms of their admission], unless the business of a foreign company writing marine insurance, is protected by the interstate commerce clause of the Constitution, which as we have seen is not the case."

The real question there put, stated in full, is this: Is such a business of a foreign company writing marine insurance protected by the commerce clause, simply and solely because the insurance written is marine insurance as distinguished from fire insurance? This distinction was urged by counsel and was very properly repudiated by the court (pp. 653, 655). For what was said by MR. JUSTICE FIELD in *Paul v. Virginia* with reference to fire insurance applies equally to marine insurance. The policies in each case are unilateral contracts of indemnity entered into by the company for a consideration paid. No regular course of interstate business or of transmission of money from one state to another is involved in either case.

But conceding that marine insurance is not inevitably

interstate commerce because it is marine insurance, it does not follow that no business done by any sort of insurance company in connection with insurance can be interstate commerce and that the mere transaction of it by an insurance company is enough to preclude all question. The language used in *Hooper v. California* must be read in connection with the argument of counsel to which it was directed and with the points made by MR. JUSTICE FIELD in *Paul v. Virginia*, with respect to the course of the fire insurance business involved in that case, —points which the court adopts and applies in the *Hooper case*.

Moreover it should be noted that HARLAN, BREWER and JACKSON, JJ., dissented.

Noble v. Mitchell, 164 *U. S.*, 367, is essentially the same case and merely follows *Hooper v. California*.

In *New-York Life Ins. Co. v. Cravens*, 178 *U. S.*, 389, the question was as to the power of Missouri to regulate contracts of life insurance made in Missouri by a mutual insurance company of New York which maintained an agency in Missouri. The cause was heard upon an agreed statement of facts. From this statement it appears that premiums were paid in Missouri (p. 391). The statement of facts also recites that the company did business "through branch offices in the different states and territories of this country". The case, therefore, came to this, whether the contracts made in Missouri for premiums to be paid in Missouri and (so far as appears) loss to be paid in Missouri, constituted interstate commerce because the principal was a New York corporation. The illustration suggested by MR. JUSTICE FIELD in *Paul v. Virginia*, namely, purchase of goods in Virginia by a citizen of New York while in Virginia, applies to such a case as that disclosed by the agreed statement of facts. One might compare with this the case of a manufacturing company, chartered in New York, with plants in New York and in Missouri. Buying from the Missouri plant in Mis-

souri would not be interstate commerce, though that plant accounted ultimately to the New York office. It would be otherwise, however, if the only plant were in New York and that plant were to deal directly or through solicitors and collectors with residents of Missouri. In the latter case there would be commercial intercourse between the states; there would be involved necessarily transportation of goods and transmission of money from one state to the other, and it is this element of transmission that is decisive.

It is true there was a recital in the contracts involved in *New-York Life Ins. Co. v. Cravens* that they should be *construed* according to the laws of New York. But it did not there appear that the contracts grew out of interstate business and called for the passing of money back and forth from New York to Missouri or for the transmission of anything else. If money passed from the agent in Missouri to the company in New York, it was because of the agency, not because of these contracts. All that the contract called for was to be done in Missouri. Unless, therefore, buying insurance in Missouri of a New York company through its resident agent was of itself interstate commerce, no question of interstate commerce was raised. The essential element of interstate dealings and transportation or transmission was lacking. The observation of MR. JUSTICE MCKENNA at the close of the opinion (p. 401) proceeds on this point. He says,

"'The contract of insurance [quoting from *Hooper v. California*] is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the perils of the sea.' And we add, or against the uncertainty of man's mortality."

In other words the nature of the peril insured against is not material. So long as there is no element of interstate intercourse or of transmission from one state to

another, but a contract is made in one state calling for payment and performance there, the transaction is wholly intrastate, whatever the subject of it. When, however, we get these decisive elements of interstate intercourse and of transmission from one state to another, it must be equally immaterial whether it grows out of travel for pleasure or recreation, telegraphing or telephoning for merely friendly or social purposes, lotteries, instruction by correspondence, or insurance, for in any and every such case it is interstate commerce. No less must it be immaterial whether the subject transmitted is a sightseer or sportsman walking across an interstate bridge to view the landscape or to hunt or fish for his amusement, a telegram of inquiry as to the recipient's health, a telephone message inviting the recipient to dinner, a lottery ticket, a letter of advice and instruction to a student, or business done between the states involving money regularly transmitted by way of insurance premiums under contracts and a course of business calling for such regular transmission. In all such cases there is a "current of commerce between the states" (as the court put it in *Swift v. United States*, 196 *U. S.* 375, 399), which the states cannot obstruct.

Nutting v. Massachusetts, 183 *U. S.*, 553, 556, was a prosecution for negotiating insurance with a foreign corporation not admitted to do business in the state. The conviction was sustained, upon the ground that the state had the power to prohibit foreign insurance companies from making contracts of insurance within its limits except upon such conditions as it might prescribe, "*not interfering with interstate commerce*" (p. 556); that the contract of marine insurance involved was not an instrumentality of commerce; and that, as the state could prohibit the transaction of such business within its limits by the company, it could equally prohibit transaction thereof by agents of the company, or by brokers who are agents of both parties.

Thus it will be seen that *Nutting v. Massachusetts* is in effect the same as *Hooper v. California*. But it is significant that MR. JUSTICE GRAY was careful to hold that the power to prescribe conditions to foreign insurance companies did not extend to interference with interstate commerce. Clearly he saw, as did MR. JUSTICE MILLER in *Liverpool Ins. Co. v. Massachusetts*, 10 *Wall.*, 566, 573, that the manner in which the business is conducted may be material and that an insurance business may involve a "current of commerce between the states" which a state may not obstruct.

It may be noted that MR. JUSTICE HARLAN dissented.

Summing up the foregoing cases, they really come to this: that an insurance company of one state, having in another state an agency by which it conducts its business therein, is not an instrumentality of interstate commerce, and its business, *so conducted*, is not interstate commerce. All of them proceed at bottom upon the proposition that the mode of transacting the business made the transactions involved *intrastate* and not *interstate*. In the *Hooper case* and the *Nutting case* the court was careful to point out that the company was acting in the state through the broker, who was its agent, and, the contract being local and unilateral, no interstate negotiations or dealings nor the transmission of anything from one state to another was required. The premium was paid in the state, and might remain in the state permanently for all that the contract provided. The loss was payable in the state, and for anything that appeared or that the contract required might be paid out of accumulated premiums in the state or other moneys of the company therein.

In short, in all the prior insurance cases the element of intercourse between the states, of transmission from one state to another, was wanting. In the case at bar, on the other hand, a regular course of such intercourse and transmission, involving the payment in New York by citizens of Montana of some $350,000 annually, all of which

passes immediately from the one state to the other, constitutes a "current of commerce between the states". And the court must recognize business so conducted as interstate commerce, or else hold that it is not commerce, not because it is not wholly interstate intercourse and interstate business, but because, although wholly interstate, it is business involving the making and performing contracts of life insurance.

II.

The present case is also wholly distinct from the prior cases decided by this Court involving labor or emigration agencies, bucket shops and private banks.

Another group of cases, superficially analogous, must be examined at the outset, especially since these cases cite and rely upon those just considered.

In *Williams v. Fear*, 179 U. S., 270, a tax was imposed on "each emigrant agent or employer or employee of such agent doing business in this state". The tax was upheld, MR. JUSTICE HARLAN dissenting. In this case the tax was not imposed on the laborers' going out of the state nor on the taking of them out. Nor was it imposed on any instrumentality of their going out or being taken out. Instead it was imposed upon the business, conducted wholly in the state, of soliciting laborers to go out and of finding employment for them and finding employees for non-resident employers. The business done in the state, upon which the tax was imposed, wholly lacked the element of transmission from one state to another. Such transmission as took place after the soliciting, was quite independent of the agent's business. Whatever took place by correspondence between the agent and his non-resident patrons was not interfered with. In the case at bar, on the other hand, there is a regular course of dealing and transmission from Montana to New York and *vice versa*.

In *Ware and Leland v. Mobile County*, 209 *U. S.*, 405, the state of Alabama imposed a tax upon "each person engaged in the business of buying and selling futures for speculation or on commission, either for themselves or for other persons, and each place of business commonly known as cotton exchanges, or stock exchanges, and sometimes called 'bucket shops'". The tax was upheld. In rendering the opinion of the court, MR. JUSTICE DAY classed the case with the insurance cases already considered, which, he said, hold,—

> "That contracts between citizens of different states are not the subjects of interstate commerce, simply because they are negotiated between citizens of different states, or by the agent of a company in another state, *where the contract itself is to be completed and carried out wholly within the borders of a state*, although such contracts incidentally affect interstate trade" (p. 411).

He then proceeds to show that so far as these dealings in futures are merely speculative and are followed by no actual delivery, they involve no transmission of anything from one state to another; and that so far as they contemplate or result in any delivery, the stipulated facts set forth that "when the orders transmitted are received in the foreign state *the property is bought in that state and there held for the purchaser*" (p. 413). He further points out that the seller in these contracts "was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. *He did not contract to ship it from one state to the place of delivery in another state*"; that *if shipments were made* in any case, *it* "*was not because of any contractual obligation so to do*"; and hence that there was *not* "*necessarily any movement of commodities in interstate traffic because of the contract made with the brokers*" (p. 413). Accordingly it was held properly that the contracts were not instruments of interstate commerce, since nothing was transmitted from one state to another by virtue of them, and the case was

compared to the prior insurance cases, in which the premiums were paid in the state where the policy was made and delivered and the policy did not call for or require the transmission of anything from one state to another.

In the case at bar, in striking contrast with these cases, there is a contractual obligation in each instance made by negotiations conducted by mail and express between the Home Office in New York and a resident of Montana which involves sending money annually from Montana to New York as premiums and under which some $350,000 pass annually from the one state to the other accordingly. This regular course of transmission of money is a necessary result of the contracts with residents of Montana, whereby they agree to pay premiums annually in New York. Moreover, by virtue of and as a necessary result of these same contracts, loans, matured endowments and death losses are transmitted from New York to Montana. Whereas in the prior cases the losses were payable in the state and out of any funds there, so that no transmission of money was required; here the contracts, making losses payable in New York, and the course of business, are such that necessarily and inevitably there must be a return current of transmission of money from New York to Montana. The very things the lack of which was pronounced decisive in *Ware and Leland v. Mobile County* are to be found conspicuously in the case at bar. And, as Mr. Justice Day points out, it was the lack of these same things which was decisive in *Paul v. Virginia* and *Hooper v. California*.

In *Engel v. O'Malley*, 219 U. S., 128, the plaintiff alleged that his business consisted chiefly "in receiving deposits in very small sums from time to time until they reach an amount sufficient to be sent to other states and mainly to foreign countries" (p. 135). The state law required a license of private bankers for receiving money for deposit or transmission. The context shows clearly that this license was required, not for transmission of

the money or for passing the money out of the state, but for receiving the money on deposit for accumulation with a view to ultimate transmission; and the court so construed it. In the opinion of the court, MR. JUSTICE HOLMES said:

> "We cannot regard the statement of the plaintiff's business in his bill as describing the receipt of bailments for the transmission of the identical objects received to other states. Neither do we regard the law as having such bailments primarily in mind. Under the statement in the bill and the words of the law, we must take it that the money received, even when received for transmission, becomes the money of the depositary and his obligation that of a debtor under contract to pay as may be directed. Presumably the depositor retains the right to call for his money himself or to change any direction that may have been given until the money has left the private banker's hands. The . . . law was passed for the purpose of regulating and safeguarding the business of receiving deposits, which business is not to be confounded with the later transmission of money, although leading to it. *Musco v. United Surety Co.*, 196 *N. Y.*, 459, 466, 467. The fact *that it is very likely to lead to it does not change the result. Diamond Glue Co. v. United States Glue Co.*, 187 *U. S.*, 611, 616. The case is similar in principle to *Ware and Leland v. Mobile County*, 209 *U. S.*, 405."

Accordingly, the license was upheld.

It will be perceived that the distinction made here is precisely the one for which we have been contending. The deposits might possibly or might even very likely lead to transmission of money to other states or abroad. But they did not require or involve such transmission and the money might equally be withdrawn and used at home. Hence such deposits were not agencies or instruments of transmission of moneys to other states and so were not instruments of interstate or of foreign commerce. As pointed out in the opinion, manufacture

may contemplate and may ultimately lead to exportation and foreign or interstate commerce. But it does not necessarily lead thereto; the manufactured product may be consumed or disposed of at home. Such cases are wholly distinct from the case at bar, where each policy arises from interstate negotiations and the whole course of business not merely contemplates but requires and in execution thereof inevitably involves interstate intercourse, including the transmission of moneys from Montana to New York and *vice versa*.

Summing up these cases, it will be seen that they reinforce and indeed establish the view of the prior insurance cases for which we here contend. Where a contract though made between a corporation of one state and a citizen of another, is made in the latter and does not necessarily involve interstate negotiations or the transmission of anything from the one state to the other, the making of such a contract is not interstate commerce, nor is such a contract an instrument of such commerce. It is at best only "an incident of commercial intercourse". But *when the contract results from interstate negotiations, and obligates the parties to a course of interstate dealing, including the transmission of moneys and documents from one state to the other, and cannot be performed according to its terms without such a course of dealing and transmission, the transaction is manifestly interstate commerce. It is not business done within the state; it is business done between the states.*

III.

The course of business between the States of New York and Montana carried on by the plaintiff company is within the very object and purpose of the commerce clause of the Federal Constitution, and the situation in which it and other companies doing a like business find themselves in attempting to carry on such course of business between the States, involves the very mischiefs which it was the purpose of that clause, and a chief purpose of the Federal Constitution, to put an end to.

resulted chiefly from the necessity of freeing the general business of the country from local control has always been recognized.

1 *Story, The Constitution*, § 259.

Bancroft, History of the Formation of the Constitution, Chap. IV.

In the letter submitting the draft prepared by the Convention, the vesting of power to regulate commerce in the general government is named, along with the delegation of the power of making war, making treaties, and raising revenue, as something long desired, the necessity whereof called for the new organization.

3 *Farrand, Records of the Federal Convention*, 666.

Every statement of the defects of the Confederation made in the Convention put the exigencies of interstate business in the foreground, and every draft and plan submitted provided for national instead of local regulation of commerce.

1 *Farrand, Records of the Federal Convention*, 243, 247, 496, 501.

As James Wilson put it, "War, commerce and revenue were the great objects of the general government."

1 *Farrand, Records of the Federal Convention*, 275.

What, then, was the condition in which the business of the country stood in 1787? Story, who, born in 1779, in a commercial community, is all but an eyewitness, says,—

> "It was, indeed, idle and visionary to suppose, that while thirteen independent states possessed the exclusive power of regulating commerce, there could be found any uniformity of system, or any harmony and co-operation for the general welfare. Measures of a commercial nature, which were adopted in one state from a sense of its own interests, would be often countervailed or rejected by other states from similar motives. If one state should deem a navigation act favorable to its own growth, the efficacy of

such a measure might be defeated by the jealousy or policy of a neighboring state. If one should levy duties to maintain its own government and resources, there were many temptations for its neighbors to adopt the system of free trade, to draw to itself a larger share of foreign and domestic commerce. The agricultural states might easily suppose that they had not an equal interest in the restrictive system with the navigating states. And, at all events, each state would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view. To do otherwise would be to sacrifice its immediate interests, without any adequate or enduring consideration; to legislate for others and not for itself."

1 *Story, The Constitution*, § 295.

Madison says,—

"The same want of a general power over Commerce led to an exercise of this power separately, by the states, which not only proved abortive, but engendered rival, conflicting and angry regulations. Besides the vain attempts to supply their respective treasuries by imposts, which turned their commerce into the neighboring ports, and to co-erce a relaxation of the British monopoly of the W. Indn. navigation, which was attempted by Virga. the States having ports for foreign commerce, taxed & irritated the adjoining states, trading thro' them, as N. Y. Pena. Virga. & S-Carolina. Some of the states, as Connecticut, taxed imports as from Massts. higher than imports even from G. B. of which Massts. complained to Virga. and doubtless to other states (see letter of J. M.) In sundry instances as of N. Y. N. J. Pa. & Maryd. the navigation laws treated the citizens of other states as aliens."

3 *Farrand, Records of the Federal Convention*, 547-8.

Again:

"The other source of dissatisfaction was the peculiar situation of some of the states, which having

no convenient ports for foreign commerce, were subject to be taxed by their neighbors, thro whose ports their commerce was carryed on. New Jersey, placed between Phila. & N. York, was likened to a Cask tapped at both ends: and N. Carolina between Virga. & S. Carolina, to a patient bleeding at both Arms. The Articles of Confederation provided no remedy for the complaint: which produced a strong protest on the part of N. Jersey: and never ceased to be a source of dissatisfaction & discord, until the new Constitution superseded the old."

3 *Farrand, Records of the Federal Convention*, 542.

Whereas in 1787 the general commerce of the country had thirteen masters, each supreme in its own locality, each moved only by self interest, and each possessed of arbitrary power, to-day one of the largest and most important branches of the general business of the country, the business of interstate insurance by insurance corporations, is, as the several states assert, subject to some fifty masters, each supreme in its locality, each moved largely by local self-interest, and each claiming arbitrary power. Each state, we are told frankly in a recent case, *may exact of foreign insurance companies which seek to do business with its citizens "any stipulation it pleases."*

City v. Royal Exchange Assurance Corporation, 5 *Ala. App.*, 318.

It is worth while to compare the local treatment of general business prior to the Federal Constitution with the local treatment of the general and national business of insurance to-day, for the parallel is exact.

To summarize the difficulties under which the general business of the country labored in 1787: (1) The several states sought to relieve the burden of local taxation by imposing taxes upon the general business of the country and upon the trade of other states; (2) they sought by discriminatory legislation to give an advantage to local traders over the traders of other states, and to local busi-

ness at the expense of the business of other states; (3) they enacted retaliatory statutes to meet such discrimination; (4) they enacted regulations in entire disregard of the legislation of their neighbors, thus leading to conflict and subjecting trade to a multitude of widely divergent legal systems; (5) many of them subjected foreign commerce and trade to oppressive and burdensome exactions; (6) they often treated citizens of other states, seeking to carry on business across state lines, as aliens merely doing such business on sufferance.

(1) *Taxation.* (*a*) General business in 1787.

Madison says that the several states made "attempts to supply their respective treasuries by imposts" on trade with and the trade of other states.

3 *Farrand, Records of the Federal Convention*, 547.

North Carolina and Rhode Island, until they adhered to the new Constitution, "were necessarily treated as foreign states and subjected to pay a duty upon all goods, not of their own production, which they should import."

2 *Arnold, History of Rhode Island*, 554.

State legislation prior to the Federal Constitution is filled with attempts to shift the burden of raising revenue upon general commerce.

See 12 *Pa. St. L.*, 99 ("An act to encourage and protect the manufactures of this state by laying additional duties on the importation of certain manufactures which interfere with them", 1785).

12 *Pa. St. L.*, 146 (A supplement to the foregoing).

12 *Pa. St. L.*, 233 (Amending the two former because it was found that "the said additional duties . . . will be the means of injuring in a very high degree the revenue and commerce of this state").

12 *Pa. St. L.*, 403 (A long tariff act).

10 *Pa. St. L.*, 252 ("An act for an impost on goods, wares and merchandise imported into this state," 1780).

10 *Pa. St. L.*, 411 ("An act for guarding and defending the navigation in the bay and river Delaware", 1781, lays additional duties).

11 *Pa. St. L.*, 8 ("An act for raising an impost on goods, wares and merchandise *brought into this state by land*", 1782).

11 *Pa. St. L.*, 188 (Supplement to tariff of 1780, enacted, 1782).

11 *Pa. St. L.*, 262 (A "*further impost*", 1782).

Laws of New York, 1784, Chap. 10 ("Imposing duties on the importation of certain goods, wares and merchandise").

Id. Chap. 6 ("An act for the establishment of a custom house" in the port of New York).

Id. Chap. 7 ("An act imposing duties on certain goods, wares and merchandise imported into this state").

Laws of New York, 1785, Chap. 68 (Imposes additional duty on goods imported, "not consigned to a citizen of this state").

Id. Chap. 81 ("An act imposing duties on goods and merchandise imported into this state, 1787).

(*b*) Taxation of insurance business transacted by foreign companies at present.

Impartial writers in a foreign publication have stated the matter thus:

> "In the United States the companies are taxed, each by the state in which it is domiciled, upon their real estate, and often upon their capital, surplus or profits, and are required in other states to pay fees to the insurance departments, and commonly an excise of from one to two and one-half per cent. of their premiums. . . . The taxes, the average rate of which increased fifty per cent. within the period 1891-1899, are heavier in many states than

> can be justified by public policy or by the analogy of other corporate interests. The true principle doubtless is that while the capital employed in insurance for gain ought to contribute to the state the same share of its profits as other capital, yet the premiums, agencies, policies and entire machinery representing only losses and providing for their distribution should be exempt as far as the necessities of the public treasury permit."

Encyclopaedia Britannica, (11 ed.), XIV, 663-4.

It would be idle to cite the legislation of the different states imposing excise or license taxes upon foreign insurance companies for the privilege of doing business with the citizens of the several states. These statutes are so familiar that it is enough to mention their striking similarity to the legislation of the states under the Confederation above referred to. A few illustrations from the decisions of the courts, however, are significant. Over and above license fees and taxation upon premiums, it is a common practice to provide for city license taxes whereby every municipality in the state in which an agent transacts business may exact a separate license of a foreign company. *City v. Equitable Life Insurance Society*, 114 *La.*, 836; *German Insurance Co. v. Louisville*, 117 *Ky.*, 593; *City v. Mutual Life Insurance Co.*, 110 *Mo. App.*, 124; *Humphreys v. City*, 25 *Gratt.*, 97.

In some cases, in addition to two or two and one-half per cent. upon their gross receipts, foreign companies are charged with a license fee for every office, agent or agency in the state. In other cases, foreign companies are compelled to pay license fees and state taxes upon receipts, and a municipal license fee upon local receipts.

(2) *Discriminatory legislation.*—

(*a*) Against traders and citizens of other states prior to the Federal Constitution:

> "All goods, wares and merchandise brought or imported into this state by any foreigner *and not con-*

signed to a citizen of this state, shall be subject to pay one and one-half per cent. more than such goods, wares or merchandise imported by the citizens of this state."

Laws of New York, Eighth Session, Chap. 68 (1785). See also *Id.*, Chap. 81 (Laws of New York, 1785-1788, vol. 2, p. 521); also *Laws* of 1782, Chap. 32 (Laws of New York, 1785-1788, vol. 1, p. 643).

11 *Pa. St. L.*, 295 (Prohibits hawking or peddling of merchandise not manufactured in the state).

4 *S. C. Stat. L. no.* 1216 ("An act for levying and collecting an impost on transient persons," 1784. The preamble recites that "transient persons coming into this state to trade do enjoy all the advantages of citizens thereof without contributing to the support of the government").

(*b*) Against insurance companies of other states today.

A few examples will suffice,—

In Kentucky, "Any person who shall in any manner directly or indirectly aid or assist in transacting the insurance business of any insurance company" must have a license. *Carroll's Stat.*, 1909, § 633.

This applies to foreign, but not to domestic, companies.

Com. v. Gregory, 124 *Ky.*, 256.

In another state, domestic life insurance companies pay one per cent. upon gross premiums, while foreign companies pay two per cent.

Alabama Code (1907), §§ 4557, 4570.

In another state, there is a tax of two per cent. on the excess of premiums over losses paid, unless the company has fifty per cent. of its assets invested in securities of the state or some municipality in the state or property situated in the state. In the latter event, the tax is but one per cent.

Wash. Rem. & Bal. Ann. Codes, § 612.

Retroactive taxation of gross premiums received in the past is directed against foreign insurance companies where domestic companies escape.

People v. Kelsey, 188 *N. Y.*, 541, 116 *App. Div.*, 97.

Bonds have been required of foreign companies based upon the amount of premiums collected in the past, as a condition of doing business.

Ark., Acts of 1905, p. 772.

Tex., Act, Mch. 20, 1909, § 1.

Here, as in state legislation prior to the Federal Constitution, the theory that dealing with citizens of the state is a privilege, invites arbitrary regulation and narrow discriminations which serve only to hamper a national, indeed an international, business.

3 *Retaliatory legislation.*

Moreover, in the case of local legislation to-day regulating the transaction of business with citizens of the state by foreign insurance companies, as in the case of state legislation prior to the Constitution which regulated trade and commerce with citizens of the several states, narrow and discriminatory legislation in one state inevitably leads to retaliatory legislation by other states. Legislation prior to the Federal Constitution shows many examples of such retaliatory legislation. Indeed many of the impost and custom statutes of that period obviously enough are meant to be retaliatory even where a retaliatory purpose is not expressed. Occasionally, however, the retaliatory purpose is expressly set forth.

Laws of Mass., 1780-1800, *vol.* 1, *p.* 336.

The act referred to is entitled "An act to enable the citizens of this commonwealth to discharge the debts due from them to citizens of certain other states in the same manner as the citizens of those states are enabled by law

to discharge debts due from them to the citizens of this commonwealth."

With this should be compared the following New York law, which is substantially the same as a like law now in force in practically all of the states,—

> "If, by the existing or future laws of any state, an insurance corporation of this state having agencies in such other state or the agents thereof, shall be required to make any deposit of securities in such other state for the protection of policyholders or otherwise, or to make payment for taxes, fines, penalties, certificates of authority, license fees or otherwise, greater than the amount required by this chapter from similar corporations of such other state by the then existing laws of this state, then and in every such case, all insurance corporations of such state, established or heretofore having established an agency in this state shall be and they are hereby required to make the like deposit for the like purposes in the insurance department of this state, and to pay the superintendent of insurance for taxes, fines, penalties, certificates of authority, license fees and otherwise, an amount equal to the amount of such charges and payments imposed by the laws of such other state upon the insurance corporations of this state and the agents thereof."

The Insurance Law of New York, § 33.

See also:

Union Central Life Insurance Co. v. Durfee, 164 *Ill.*, 186.

State v. Insurance Co. of North America, 115 *Ind.*, 257.

State v. Insurance Co. of North America, 71 *Neb.*, 320.

(4) *Conflicting legislation.*

The contemporary testimony cited above speaks of the difficulty arising from conflicting local regulations. For instance, Madison speaks of "rival, conflicting and angry regulations", 5 *Elliott's Debates* 119. In the same way an insurance company to-day which tries to do business with citizens of other states than that in which it is in-

corporated finds itself subject to the greatest variety of local rules governing almost every detail of its business. It would not be proper to set forth this great variety of local regulation in detail in this argument. It may be found stated, however, in convenient form so far as it has to do with the details of the contract of insurance, in the appendix to the third edition of *Richards on Insurance, pages* 681-717. This exhibit of conflicting local legislation, which is by no means complete, should speak for itself. One further instance, however, is significant of the attitude of such legislation. In construing a statute with reference to the loaning of money upon policies, the fact of a conflict between the legislation of different states governing the company, on the one hand, where it issues the policy and loans the money, and, on the other, where the insured resides, is held quite immaterial. *Continental Life Insurance Co. v. Hattabaugh*, 21 *Ida.* 245.

(5) *Oppressive and burdensome requirements.*

(*a*) One of the grievances of the period prior to our Federal Constitution was the oppressive and burdensome exactions imposed upon general trade by local inspection laws. Not only did states often put embargoes upon exportation of articles of trade produced within their borders, but, in order to raise revenue and for other local reasons, they often put all manner of difficulties in the way of certain exports by elaborate and expensive inspections. Also they often granted to particular persons the sole right to make or vend certain articles within the state. These restrictions upon trade were entirely in the discretion of each state and were governed only by its view of its self interest for the time being.

A few examples may be cited:

(i) Embargoes.

New York, Laws of 1778, Chap. 10 (Laws, 1777-1784, vol. 1, p. 18. Forbids exportation of flour, meal and grain.)

10 *Pa. St. L.*, 43 (Forbids exportation of provisions by sea, 1780).

Id. 227 (Continues the last act).

Id. 243 (Restricts exportation of wheat flour, 1781).

Id. 325 (Supplement to last, 1781).

4 *S. C. St. L., No.* 1098 (p. 447. Prohibits exportation of provisions, hemp and cordage, 1778).

(ii) Restrictions on immigration.

11 *Pa. St. L.*, 602 (Provides for a register of all German passengers who arrive at Philadelphia, 1782).

(iii) Inspection laws. The statutes imposing onerous inspections upon exports and imports are legion. The following are typical:

10 *Pa. St. L.*, 288 (Inspection of bread and flour exported, 1781).

Id. 379 (Supplement to the foregoing).

11 *Pa. St. L.*, 63 (Supplement to the first mentioned act, 1782. There is also a further supplement on page 378, 1782.).

12 *Pa. St. L.*, 110 (Regulating the measurement of corn and salt imported into the port of Philadelphia, 1785).

Id. 359 (Exportation of fish, 1787).

New York, Laws of 1785, Chap. 35 (Laws of New York, 1785-1788, vol. 2, page 66. Inspection of flour for exportation).

New York, Laws of 1784, Chap. 40 (Laws of New York, 1777-1784, vol. 1, p. 665. Inspection of pot and pearl ashes for exportation).

Mass. Act of March 16, 1784 (Laws of Mass., 1780-1800, vol. 1, p. 164. Inspection of shingles for exportation).

Mass. Act of November 9, 1784 (Id. 208. Regulating the exportation of flaxseed).

Mass. Act of November 8, 1785 (Id. 253. Regulating the exportation of butter).

(iv) Exclusive rights of manufacture and sale within the state.

Laws of New York, 1780, Chap. 71.

10 *Pa. St. L.*, 131.

11 *Pa. St. L.*, 411 (1782).

Id. 517 (1782).

With these should be compared the great mass of legislation in our several states to-day imposing upon foreign insurance companies inspections and valuations at the expense of the companies. With respect to the legislation prior to the Constitution above referred to, it will be noted that one great grievance was that several inspections by several states were not unlikely to be inflicted upon the same shipment. In the same way to-day, instead of one thoroughgoing inspection of an insurance company doing a national and indeed international business, the one business is likely to find itself subject to any number of inspections going over exactly the same ground in order to satisfy the sovereign dignity of each state with whose citizens the company is doing business. But a few of these statutes need be referred to. Those cited below are taken from states within which the greater part of the insurance business that is done, is done by foreign companies. These same companies, thoroughly inspected at home, find themselves none the less subjected to as many inspections from other states as the legislators of such states may dictate or the administrative authorities thereof may choose to make.

1 *La. Rev. L.*, 1904, 861, § 17.

La. Act 114 *of* 1898, § 6.

La. Act 110 *of* 1900, § 5.

Kans. Gen. St., 1909, §§ 4071, 4074, 4075, 4085.

Ala. Code, 1907, §§ 4456-4458, 4555.

Ga. Code, 1911, § 2433.

Col. Rev. St., 1908, § 3100.

Wash. Rem. & Bal. Ann. Code, § 6144.

Id. Rev. Codes, § 2868.

Comparison should also be made between the restrictions on business prior to the Federal Constitution above noted and such state statutes as those prescribing salaries which a foreign company may pay to its officers or those it employs at its home office, and denying a license to do business in the state to a company whose salary roll permitted at its domicile is greater than the local legislature considers expedient.

State v. Vandiver, 222 *Mo.*, 206.

In this connection the analogy of state legislation prior to the Federal Constitution is remarkably close. Each state had to remember then that, if it went too far, other states might retaliate; and hence in the years just before the adoption of the Federal Constitution, a tendency in state legislation is noticeable toward modifying some of the oppressive exactions of the earlier legislation. In the same way in state regulation of foreign insurance companies to-day a tendency has become noticeable to accept the inspection of the home state, reserving nevertheless the right at any time to make such inspections as each state may see fit.

(*b*) Finally, it was a grievance, prior to the enactment of the Federal Constitution, that citizens of other states, seeking to carry on business across state lines, were often treated as aliens, merely doing business on sufferance. Thus Madison says,—

> "In sundry instances, as of New York, New Jersey, Pennsylvania and Maryland, the navigation laws treated the citizens of other States as aliens."

to do business by way of

Ky., Car

The resemblance of this situation in which one of the most important departments of business finds itself today to that in which all business found itself in 1787 is so striking, the mischiefs that called for remedy in the latter case are so obviously present in the former, and the remedy in each case is so manifestly the same, that a construction of the term "commerce" or a view of the business of insurance that leaves this great national business in the anachronistic position of laboring under the exactions and seeking to meet the commands of fifty masters cannot stand.

The classical measure of interpretation is the old law, the mischief, and the remedy. The old law was, that general business, the business of the nation not merely of the locality, had thirteen masters. The mischief was, that the commands of these masters were dictated by self-interest, often contrary to the general interest, and were not infrequently discriminatory, arbitrary, conflicting and oppressively exacting, and that they led to unseemly retaliations. The remedy was, to supersede the thirteen masters by one master.

So to-day, for fifty masters, moved by self-interest and laying down arbitrary, discriminatory, conflicting regulations for the conduct of a nation-wide business, the remedy of one master is urgently demanded. So far as the business of insurance is in truth and in fact local, it must stand like other local business. But so far as it is interstate and nation-wide, so far as it is done between the states by companies that deal from their home offices with citizens of all our states and thus set in motion a regular "current of commerce between the states," there is every element that dictated the commerce clause of our Constitution and one of the chiefest elements in the very making of that Constitution. *The use of that clause to further social legislation which is now gained on is of even greater social importance than the maintenance of the social interest in the security of trade and freedom of national business from local bonds.*

which called the clause into existence. Above all things, the commerce clause is and was established to be a great charter of freedom of trade between the states. Truly it is a lame and impotent conclusion that would deny the protection of this charter to the course of interstate business disclosed in the complaint in the case at bar, while extending it to hawkers and peddlers, to lottery tickets, and to teaching by correspondence.

IV.

The course of business in this case is interstate commerce within the decisions in International Text Book Company *v.* Pigg, 217 U. S. 91, and the Lottery case, 188 U. S. 321.

In *International Text Book Co. v. Pigg*, 217 *U. S.*, 91, the plaintiff was a corporation, organized under the laws of Pennsylvania, engaged in instruction by correspondence. Its executive officers, teachers and instructors resided and exercised their respective functions at Scranton in that state. It employed local or traveling agents in other states, called "solicitor-collectors". The duties of these solicitor-collectors and the course of business of the company are thus stated in the opinion of the court.

> . . . . . to procure and forward to the company at Scranton, from persons in a specified territory, on blanks furnished by it, applications for scholarships in its correspondence schools, and also to collect and forward to the company deferred payments on scholarships. In order that applicants may adapt applications to their needs, each solicitor-collector is kept informed by correspondence with the company of the fees to be collected for the various scholarships offered and of the contract charges to be made for cash or for deferred payments, as well as the terms of payment acceptable to the company and its scholars, the scholarship and instruction papers, text books and illustrative apparatus called for under each accepted application are sent by the

company from Scranton directly to the applicant and instruction is imparted by means of correspondence through the mails between the company at its office in that city and the applicant in another state" (pp. 99-100).

The statute of Kansas required the company, in order to do business in the state, to file with the Secretary of State a statement showing the authorized and paid-up capital stock of the company, the par and market value of its shares, a detailed statement of its assets and liabilities and several other burdensome requirements. This was held invalid as to corporations engaged in interstate commerce.

In its opinion, the Court relied largely upon *Pensacola Telegraph Co. v. Western Union Telegraph Co.* 96 *U. S.*, 1, in which it was laid down that the "*transmission of intelligence*" among the states is not to be obstructed or unnecessarily encumbered by state legislation, and *Western Union Telegraph Co. v. Pendleton*, 122 *U. S.*, 347, 356, where the court held the telegraph to be an instrument of commerce and the transmission of messages by telegraph from one state to another to be interstate commerce because it transports "ideas, wishes, orders, and intelligence".

On this point, Mr. Justice Harlan, delivering the opinion of the court, said:

> "It was said in the Circuit Court of Appeals for the Eighth Circuit, speaking by Judge Sanborn, in *Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 *Fed. Rep.*, 1, 17, that 'All interstate commerce is not sales of goods. Importation from one state into another is the indispensable element, the test of interstate commerce; and *every negotiation, contract, trade and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce.*' If intercourse between persons in different states by means of telegraphic messages conveying intelligence or informa-

> tion is commerce among the states, which no state may directly burden or unnecessarily encumber, *we cannot doubt that intercourse or communication between persons in different states, by means of correspondence through the mails, is commerce between the states*, within the meaning of the Constitution, *especially where, as here, such intercourse and communication really relates to matters of regular continuous business* and to the making of contracts and the transportation of books, papers, etc., appertaining to such business" (p. 107).

In other words, the course of business in this case necessarily involved transmission of information and instruction from Pennsylvania to Kansas through the mails and of money from Kansas to Pennsylvania.

This case does not go on the circumstance that books or "instruction papers" might be transported from Pennsylvania to Kansas. The decision protects the whole business of the company, of which the chiefest and most vital part is the imparting of instruction through correspondence. The argument of counsel for the plaintiff sought to rest the case on the sale of books and pamphlets (p. 83). It is significant the court did not adopt this view, but held that imparting instruction by correspondence was commerce because of the exchange of letters and transmission of ideas and of information necessarily involved. The correspondence school was not transporting. But it was doing a business and making contracts which necessarily involved transmission of information and instruction from one state to another and the transmission of money in return therefor.

The result in *International Text Book Co. v. Pigg*, would not have been different had the text books and "instruction papers" been merely loaned for temporary use by the student purchasing the correspondence instruction. If, however, that case is to be rested upon the narrow ground of sale of the incidental "instruction papers," certainly sale of indemnity through printed policies of insurance is quite as much commerce as sale of in-

struction through printed instruction papers; and so transmission of the one is not fundamentally different from transmission of the other, where each transaction takes place through the mails between citizens of different states. Sale of indemnity through policies of insurance had become one of the chief businesses of the world before sale of instruction through "instruction papers" was ever thought of.

Moreover, the instruction is not for resale and is not a commodity in the state into which it is sent; and if the "instruction paper" has any value apart from the scheme of instruction of which it is a part, such value must be small indeed: whereas, the policies involved in the case at bar have a recognized and important commercial function as security for loans, and are clearly a commodity devoted to commercial uses in the state in which they are held and elsewhere.

Comparing the course of business in the correspondence school case with the course of business here, (1) in each case a foreign company, which makes the contracts at its Home Office, procures applications therefor through a local solicitor; (2) the one sends from its Home Office a contract called a scholarship, the other sends from its Home Office a contract called a policy; (3) the contract called a scholarship may be in consideration of cash paid down or it may call for "deferred payments:" the contract called a policy, *in this case*, requires payment of annual premiums at the Home Office over a long series of years; (4) the one company maintains a collector in the locality, the other a cashier; the collector collects the cash and the deferred payments as they become due, while in the other case, the assured, who is bound to pay the premium at the Home Office, may, when so authorized by the Home Office, use the cashier, and the deposit subject only to the company's draft made by him, as a means of such transmission; (5) the one sends to the student from time to time "instruction papers" and letters containing information and in-

struction; the other sends to the insured or the beneficiary, through checks drawn on a New York bank and transmitted to such assured or beneficiary, the amount of loans on the policy, of matured endowments, and of death losses. In each case all this "current of commerce between the states" grows necessarily out of and is required by the scholarship or the policy. But in the case of the policies in the plaintiff company, because of the larger amounts involved and their much longer duration, this current of commerce in the transmission of annual premiums to, and in other dealings with, the Home Office is very much the greater.

A distinction might be suggested on the ground that the correspondence school sends the scholarship directly to the student, while the insurance company sends it to the solicitor with instructions to deliver it upon further advice. But, if the contract when executed, requires in its performance transmission of money or merchandise from the one state to the other in a regular course of business, this cannot be material. Sales made in other states by agents who solicit and deliver do not cease to be interstate commerce because deliveries are made through the local solicitor.

Robbins v. Shelby County, 120 *U. S.*, 489, 497.

McCall v. California, 136 *U. S.*, 104.

In the latter case, where business was solicited which necessarily and inevitably involved transportation from one state to another, it was interstate commerce, and whether the local agent delivered tickets or received or paid out money was held to be quite immaterial.

The capital point in *International Text Book Company v. Pigg* is the transmission from one state to another necessarily involved in and required by the course of business and the contracts; and every element of interstate commerce in that case is to be found equally or in greater measure in the case at bar.

In *Lottery Case*, 188 *U. S.*, 321, there was an indictment for causing lottery tickets to be transported from one state to another by express. This raised the question whether the mere transmission of a lottery ticket from one state to another was interstate commerce so as to be a subject of Federal legislation. The appellants (contending that such legislation was invalid) relied upon *Paul v. Virginia* and the insurance cases following it. They argued, citing copious authorities,—

> "A lottery ticket in all its aspects, is of the same nature as an insurance policy, which represents an analogous form of wagering contract. Both forms of contract depend upon chance and uncertain events, and in principle cannot be distinguished in their nature" (pp. 327 328).

The only notice of this argument in the opinion of Mr. Justice Harlan is a brief paragraph on page 354,—

> "We are of opinion that lottery tickets are subjects of traffic and therefore are subjects of commerce, and the regulation of the carriage of such tickets, at least by independent carriers, is a regulation of commerce among the several states."

We have seen already that this criterion of transportation into another state of a commodity marketable in that state will not suffice for the decision in *International Text Book Co. v. Pigg*. But there are other and conclusive grounds for rejecting it as the basis of the *Lottery Case*. (1) In the telegraph cases (*Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 *U. S.*, 1; *Western Union Tel. Co. v. Texas*, 105 *U. S.*, 460, 464; *Western Union Tel Co. v. Pendleton*, 122 *U. S.*, 347) no commodity marketable therein was introduced into another state. This is true also of the passenger and foot bridge cases (*Kidd v. Pearson*, 128 *U. S.*, 1, 20; *Gloucester Ferry Co. v. Pennsylvania*, 114 *U. S.*, 196, 203; *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 *U. S.*, 204), the telephone case (*Richmond v. Southern Bell Telephone Co.*, 174 *U. S.*, 761), and the white slave cases (*Hoke v. United*

States, 227 *U. S.*, 308; *Athanasaw v. United States*, 227 *U. S.*, 326). Hence it was not necessary to show that a marketable commodity had been sent into another state.

The proposition that lottery tickets in that particular case were marketable commodities was at least a very doubtful one. As was said in the dissenting opinion, they were "forbidden to be issued or dealt in by the laws of Texas, the terminus *a quo*, and by the laws of California or Utah, the terminus *ad quem*". If, however, such a criterion is to be insisted on, as in the opinion in *Paul v. Virginia*, it is to be observed that the policies in the case at bar are common subjects of sale and transfer and are assignable, and may be and constantly are used legitimately as security for loans and as collateral, and are much more and much more properly subjects of commerce than are lottery tickets under the circumstances of the *Lottery Case*. Thus no distinction may be made between the *Lottery Case* and the present case with respect to the nature of the thing transmitted from one state to the other.

This throws the *Lottery Case* on its true ground, the ground which includes passengers, the telegraph, the telephone, correspondence instruction and lottery tickets, as well as traffic and navigation, namely, the transmission of something from one state to another in the course of intercourse among the states.

When Mr. Justice Harlan said that the lottery tickets were "subjects of commerce", he meant, not that they were marketable where they were sent, but that they were capable of transmission from state to state in intercourse among the states, and were actually so transmitted. But so are policies of insurance and all the things incident thereto, including the premiums thereon and the proceeds thereof. The passing of money and policies of insurance from one state to another certainly can be no less commerce than the passing of lottery tickets, whatever the cause or occasion of their passing.

The capital point in the *Lottery Case* was the trans-

mission of the ticket from one state to another. Congress dealt with this and with this only and the court called it interstate commerce. In the case at bar it is the negotiating and making of the contracts and the passing thereof and of the papers and money connected therewith from Montana to New York and *vice versa*, which constitutes commerce between the states.

V.

If the reasoning of Paul *v.* Virginia, so taken as to make that case decisive of the present case, were applied to the Lottery case and to International Text Book Co. *v.* Pigg, the latter cases could not stand. It is obvious, therefore, that Paul *v.* Virginia and the cases following it cannot be so taken, but must be limited, as the facts therein limit them, to intrastate, not interstate, insurance contracts. They have no application to contracts made, continued and performed between the states.

In *Paul v. Virginia* (and the language of the opinion in that case is quoted *verbatim* in *Hooper v. California*, 155 U. S. 648, 654, as applicable to all insurance), it is said that issuing a policy of insurance is not a transaction of commerce because the contracts "are not articles of commerce in any proper meaning of the word," and four grounds are stated for this conclusion:

(1) "They are not subjects of trade and barter, offered in the market as something having an existence and value independent of the parties to them."

It has been seen that this is not true of the policies involved in the case at bar. But apply this criterion to later cases. A telegraph message or a telephone message is not a subject of trade offered in the market as something having an existence and value independent of the parties. In *International Text Book Co. v. Pigg*, it appears that the solicitor adapted the applications and

thus the company adapted the scholarships to the individual needs of the students. Were these scholarships objects of trade and barter? Were they offered in the market in Kansas by the students as having an existence and value independent of the parties? In the *Lottery Case*, as has been seen, sale of the tickets was prohibited by law in every jurisdiction concerned, and all trade or barter or offering in the market would have been illegal and nugatory.

(2) "They are not commodities to be shipped or forwarded from one state to another, and then put up for sale." Neither are passengers, nor telegrams, nor telephone messages, nor "instruction papers" of correspondence schools, nor the letters by which such schools instruct their students, nor, in any proper sense, lottery tickets the issuance and sale of which are forbidden by law in the jurisdictions from which and into which they were taken. But these policies are shipped or sent by mail from New York to Montana and the policy-holder may sell them if he wants to, and he often does.

(3) "They are like other personal contracts which are completed by their signature and the transfer of the consideration." The scholarships in *International Text Book Co. v. Pigg* also were completed by the signature of the parties and the payment of the cash price of the scholarship, or, in case of deferred payments, of the first payment. If by the word "personal" reference is made to the non-assignability of the fire policies in *Paul v. Virginia*, it must be remarked that the marine policies in *Hooper v. California* were assignable and that a scholarship for correspondence instruction adapted to the individual applicant is quite as personal, at least, as an assignable policy of marine insurance or a policy of life insurance which may be and is commonly assigned, put up as collateral and pledged for loans.

(4) "The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They

are then local transactions and are governed by the local law." This clearly refers to the well-known course of business whereby risks are assumed and policies are issued by local recording agents. For where policies are issued by the Home Office no such manual delivery is required to put the contract in force.

Triple Link Association v. Jones, 121 *Ala.*, 138.

If no conditions are imposed, issuance by the Home Office and transmission to an agent of the insurer for delivery may complete the contract, though the policy is never delivered.

Xenos v. Wickham, L. R., 2 *H. L.*, 296.

Harrigan v. Home Life Ins. Co., 128 *Cal.*, 531.

New-York Life Ins. Co. v. Babcock, 104 *Ga.*, 67.

Hallock v. Commercial Ins. Co., 26 *N. J. Law*, 268.

Porter v. Mutual Life Ins. Co., 70 *Vt.*, 504.

This point therefore cannot be applied to such cases as *International Text Book Co. v. Pigg* and the case at bar at all. But if such application could be made, the contract in each case would be one made by a foreign corporation in the locality and so subject equally to local regulation.

If, therefore, on the one hand, *Paul v. Virginia* and *Hooper v. California* are to be taken as holding that for the foregoing reasons alone—and no others are given—the business of insurance and every part thereof, *no matter how the business is conducted*; necessarily and inevitably, because it is insurance, cannot be interstate commerce, and that no policy of insurance, no matter what its provisions nor what the course of business with respect thereto, can ever be a subject or an instrument of commerce, it must follow that the later cases and in particular the *Lottery Case* and *International Text Book Co. v. Pigg* were wrongly decided, or else that insurance is an

arbitrary exception to the rules that govern every other sort of business and transaction.

If, on the other hand, *Paul v. Virginia* and *Hooper v. California* are not given so wide, unreasonable and arbitrary an operation but are looked at in view of the facts of the cases before the court, and it is recognized that interstate commerce was not involved in those cases because the contracts were purely local and made within the state with agents of the company residing there and duly authorized, and were to be performed there, and did not either in their making or performance necessarily call for the transmission of anything from one state to another, all the decisions of this court are rendered completely consistent; and it follows that when any sort of contract between citizens of different states or corporations of one state and citizens of another provides for and requires necessarily in its making and performance the transmission of persons, intelligence, instruction, property or money from one state to another, such transaction is interstate commerce, and any agency, contract or otherwise, by which such transaction is effected and brought about is an instrument of commerce whether it is a scholarship in a correspondence school or a policy of life insurance.

VI.

The proposition that interstate negotiations, resulting in interstate contracts which are subject to commercial uses and which call for, and in their performance require, a regular course of dealing between the states, including the periodic as well as final payment and transmission of money from one state to another, is interstate commerce, is in line with and is a necessary deduction from the consistent course of decision of this court since Gibbons *v.* Ogden, 9 Wheat. 1, and does not involve the retraction or modification of any decision which the court has ever rendered.

From the decision in *Gibbons v. Ogden* this court has consistently defined commerce, as used in the Constitution, to mean intercourse, and hence commerce among the states to mean intercourse among them.

> "Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations, in all its branches.
>
> MARSHALL, C. J., in *Gibbons v. Ogden*, 9 Wheat. 1, 189-190.

> "Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities."
>
> *Welton v. Missouri*, 91 *U. S.*, 275, 280.

> "Commerce among the several states comprehends traffic, intercourse, navigation, communication, the transit of persons and the transmission of messages by telegraph—indeed, every species of commercial intercourse among the several states."
>
> *Adair v. United States*, 208 *U. S.*, 176, 177.

> "Interstate commerce is business and commercial intercourse carried on between the citizens of different states."
>
> *Addyston Pipe and Steel Co. v. United States*, 175 *U. S.*, 211.

"Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms."

Hopkins v. United States, 171 *U. S.*, 578, 597.

"Transportation is essential to commerce, or rather it is commerce itself."

Railroad Company v. Hasen, 95 *U. S.*, 465, 470.

"All interstate commerce is not sales of goods. Importation into one state from another is the indispensable element, the test of interstate commerce; *and every negotiation, contract, trade and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons or information, is a transaction of interstate commerce.*"

SANBORN, J., in *Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 Fed. Rep. 1, 17, approved in *International Text Book Co. v. Pigg*, 217 *U. S.*, 91, 107.

"If intercourse between persons in different states by means of telegraphic messages conveying intelligence or information is commerce among the states, which no state may directly burden or unnecessarily encumber, we cannot doubt that intercourse or communication between persons in different states by means of correspondence through the mails is commerce among the states within the meaning of the Constitution."

International Text Book Co. v. Pigg, 217 *U. S.*, 91, 107.

In all these formulas, leaving out of sight for the moment the element of commercial intercourse or intercourse for purposes of trade, which will be considered presently, the common idea is intercourse between states in the form of transmission of something in some way from the one to the other. The thing transmitted need

not be tangible. It may be information, intelligence, instruction. There need not be physical transportation; witness the case of the telegraph and telephone, where the message is transmitted from the one state to the other, but nothing is actually transported by taking it up in the one and putting it down in the other. The negotiation and transmission of contracts and of money, simply as money, by drafts or checks sent from one state to another, comes fully within the reason and indeed fairly within the words of these formulas.

The course of development of the idea of commerce in the decisions makes this equally clear. The first and most obvious case, under the conditions of trade in this country, was the sale and exchange of goods involving transportation of them from one state to another. Accordingly it was sought at first to limit the term to traffic in merchandise. The great case of *Gibbons v. Ogden* was fought out upon the question whether navigation was commerce, and settled that it was. Next it was contended that transportation of goods and merchandise only was included. On the ground that persons are not subjects of commercial transactions, are not bought and sold, it was insisted that transportation of persons was not commerce.

BARBOUR, J., in *New York v. Miln*, 11 *Pet.*, 102, 136.

Later it became settled that the mere transit of individuals from one state to another, irrespective of the means of transportation, or locomotion, and irrespective of the purpose of such transit, was interstate commerce.

Covington Bridge Co. v. Kentucky, 154 *U. S.*, 204, 218.

Hoke v. United States, 227 *U. S.*, 308.

Athanasaw v. United States, 227 *U. S.*, 326.

Next it was established that communication from one state to another by telegraph or telephone, irrespective of the purpose thereof, as a transmission from one state

to another of "ideas, wishes, orders and intelligence," was commerce among the states.

Western Union v. Pendleton, 122 *U. S.*, 347, 356.

Richmond v. Telephone Co., 174 *U. S.*, 761.

Then came the *Lottery Case*, and once more the attempt was made to hold down the conception to the analogy of sale or exchange of merchandise. But the court again rejected the analogy and held that the mere transmission from one state to another of lottery tickets, the sale whereof was forbidden by law both where they were sent and where they were received, was interstate commerce.

Later the *Correspondence School* case was argued on the grounds of transportation of a marketable commodity from one state to another. But the court decided it on the basis of the telegraph cases and on the ground that the transmission of intelligence, information and instruction from one state to another through the mails was interstate commerce.

International Text Book Co. v. Pigg, 217 *U. S.*, 91.

Finally the White Slave Traffic cases, above cited, have put it beyond peradventure that nothing beyond transportation or transmission from one state to another is required.

What is there in common in these several successive classes of causes which have been held to involve interstate commerce, interstate traffic in goods and merchandise, interstate navigation and transportation, the passage of persons from one state to another over an interstate bridge, whether on business, as tourists, or for pleasure, the transmission of telegrams and telephone messages from one state to another, even though on no errand of trade or business, the transmission of lottery tickets, forbidden by law to be sold both in the *locus a quo* and the *locus in quem*, from one state to another, and the transmission from one state to another of women for im-

moral purposes? The sole common element, and the decisive element in each case, is the transmission from one state to another. This was what CHIEF JUSTICE MARSHALL meant by "intercourse" in *Gibbons v. Ogden*. This is what the court meant by the phrase "*importation from one state to another is the indispensable element, the test of interstate commerce*", approved in *International Text Book Co. v. Pigg*. In every case where this element has been present, the court has consistently held that there was interstate commerce.

How can it be maintained that the passing of persons from state to state, merely as tourists or for pleasure or on unlawful errands, the transmission of telegrams and telephone messages from state to state, whether on matters of business or not, the transmission of lottery tickets, of which the state forbids the sale, from one state to another, and the transmission of instruction from state to state through the mails, are each and all interstate commerce, but that negotiating and making contracts between the states, the passing and transmission of such contracts and of money and other things incident to them from state to state in a regular course of business by virtue of such contracts and in performance of them, is not? The sole basis for so arbitrary a contention is to be found in the language used in certain prior cases involving insurance, cases in which there was no such course of dealing or of anything else. The results in those cases are in accord with the principle upon which we submit this cause should be determined. It is worth while, however, to note the genesis of the language used in the opinions, by which alone the judgment under review may be sustained.

Everything that has been said in the later cases with respect to the nature and character of the insurance business is based upon and, indeed, simply repeats the observations of MR. JUSTICE FIELD in *Paul v. Virginia*. Instead of showing that the contracts and the course of business in that case did not require or involve interstate inter-

course and the transmission of anything from New York to Virginia or *vice versa*, he turned to the analogy of sale or exchange of commodities and argued that no marketable commodity was shipped from the one state to the other. It is significant that in his formula of interstate commerce in *Welton v. Missouri*, 91 *U. S.*, 280, Mr. Justice Field names only "the transportation, purchase, sale and exchange of commodities", and that in his discussion of the telegraph (*Western Union Telegraph Co. v. Pendleton*, 122 *U. S.*, 347, 352) he strains the fiction of transportation of messages to the utmost in order to bring the case within the narrower conception. This view is well illustrated by a remark of Mr. Chief Justice Fuller in *Lehigh Valley R. Co. v. Pennsylvania*, 145 *U. S.*, 192, 200:

> "This [i. e., the legal idea of commerce] is nothing more than an expansion of its simplest signification, that of an exchange of goods, the bringing of them from the seller to the buyer, however vast the range now comprehended by the term in the progress of society."

This conception of commerce as involving merely the exchange and transportation of goods with which the court had to struggle first in *Gibbons v. Ogden*, which it cast off once more in the cases involving transportation of passengers and the passage of persons from one state to another, which it rejected necessarily in the case of the telegraph, where nothing saleable is transported nor need any sale or exchange of anything result or be involved, which it rejected once more in the *Lottery Case* and in *International Text Book Co. v. Pigg*, has been laid at rest during the present year in the *White Slave Cases*. It is significant that Mr. Justice Fuller, whose language setting forth the narrower view is quoted above, wrote the dissenting opinion in the *Lottery Case*. It is significant that the argument of Mr. Justice Field in *Paul v. Virginia* was the chief reliance of the losing side in the *Lottery Case*. It

is even more significant that the court has never applied this narrower conception in the actual decision of any cause where interstate commerce as the cases now interpret it was involved. The whole course of decision has consistently repudiated it.

In the development of the law by judicial empiricism or juristic exposition there is always a tendency to work out problems on the analogy of the first case to arise, or the most obvious instance for the time being, and thus for a time to warp or unduly restrict the legal conception. Thus in the development of commercial law in Continental Europe, where it forms a separate branch, dealt with in distinct codes and committed largely to distinct tribunals, the first commercial law was the sea law and the first codes of commerce were compilations of the usages of the sea. Hence for a long time it was necessary there to argue that commerce includes traffic as well as navigation (see, for example, *Hautefeuille, Droits et devoirs des nations neutres*, I. tit. 2).

In this country, on the other hand, the most obvious case chanced to be traffic in goods and merchandise, and so at the outset long debate was required to show that navigation also was included, and attempts to restrict the conception by the analogy of sale and barter have persisted to the present. Unhappily the first case involving insurance which arose under the Constitution, was one of fire insurance effected by and through a local recording agent and purely local in its origin, in its being and in its performance, and so one where the analogy of sale and barter was most likely to confuse. The case was not one involving interstate intercourse or the transmission of anything from one state to another. Under the facts of that case the court could well say that the policies of fire insurance made and performed locally were not subjects of traffic among the states. Yet, had the case been one involving as here interstate intercourse from its inception throughout its whole course until the last act of its performance, we can imagine the judge who was able to

reconcile the telegraph with the analogy of sale and barter, pointing out that "intercourse or communications between persons in different states by means of correspondence through the mails is commerce among the states within the meaning of the Constitution", and hence that the case at bar, unlike the "local transactions" which were before the court in *Paul v. Virginia*, involving as it does interstate negotiations resulting in interstate contracts which are subject to commercial uses, and which call for and, in their performance require, a regular course of dealing between the states, including the transmission between the states of policies, notices, receipts, loan agreements, proofs of death, and other communications, as well as the payment and transmission of premiums on the one hand and loan and policy proceeds on the other, clearly presents a transaction of interstate commerce.

VII.

The object and purpose of the commerce clause of the Federal Constitution lead to the same conclusion, namely, that interstate intercourse, the transmission of anything from one state to another (and hence a fortiori a course of business necessarily involving and requiring a regular course of interstate dealing including the transmission of money) is within the purview of that clause.

As has been said, a fundamental purpose in the very framing of the Constitution was to put all intercommunication among the states and all communication and intercourse between the states and foreign nations under the control of a single government. Bitter experience of narrow and obstructive local legislation had taught the necessity of this, and with characteristic wisdom, the framers of the Constitution went into no narrow and detailed enumeration, but chose the broad and comprehensive term "commerce", a word, as this court has often said,

of the largest import, to express their purpose. In Madison's words, that purpose was to confide to Congress the power to

> "legislate in all cases to which the separate states are incompetent, *or in which the harmony of the United States may be interrupted by the exercise of individual legislation.*"

2 *Madison. Papers*, 859.

Prior to the Constitution, the external relations of each state with every other and with the world at large were under the control of each state, so far as its authority could reach physically. The urgent necessity and so the main purpose was to put all these matters of intercourse and intercommunication under one authority, and thus to set free the commercial and business energies of the nation. Accordingly all the power which the several states possessed over their relations and the relations of their citizens and inhabitants with the citizens and inhabitants of other states, and with foreign countries, was taken from the states completely and was committed to the Federal Government. While a few necessary limitations on the *exercise* of this power are imposed upon Congress in Section 9 of article 1 of the Constitution, the control is not limited in its extent and no fragment and no suggestion of a residue is reserved to the states. The whole power over intercourse with other states and intercommunication among the states which the original states had as attributes of sovereignty was superseded, and a power no less full and complete was given to Congress.

> "The power to 'regulate commerce', conferred by the Constitution upon Congress, is that which previously existed in the states."

Strong, J., in *South Carolina v. Georgia*, 93 U. S., 4, 10.

In the great case of *Gibbons v. Ogden*, the court was called upon to choose whether the Constitutional pro-

vision should be pared down to the narrow content of sale and exchange of tangible commodities, or should be given its full scope of including all intercourse and intercommunication, in whatever form and by whatever agencies; and it unhesitatingly chose the latter course. There could be no better example of the genius of CHIEF JUSTICE MARSHALL than this choice. For the event has fully justified it. No other interpretation would make our dual state and national system tolerable to-day. This is an era of universality and internationality. The thinking world is tending strongly to insist upon breaking over narrow local boundaries and on looking at things from a social point of view. This is not manifest alone in the rapid strides making in international law and the great increase of interest in that subject. Art, science, economics, labor and fraternal organizations, and even sport, are international. The growing frequency of national and of international congresses and conferences upon all manner of subjects emphasizes this breaking of local bonds.

Moreover, state boundaries are more and more everywhere,—and outside of our older commonwealths they long have been,—arbitrary lines. No barriers of race or of language or of institutions divide the states; and the Constitution intended there should be no local legal barriers to the freest intercommunication and business transactions. As Magna Charta stipulated for one measure of wine and one of corn and one of bread throughout England, so the Constitution calls for one measure of intercommunication and intercourse among the states, and that a federal measure.

The foregoing view of the meaning of the word "commerce" in the Constitution is borne out by a consideration of the phrase "*business* intercourse" or "intercourse for purposes of *trade*", to be found in most of the judicial definitions of the term. The decisions have never insisted upon this element in the actual application of the clause. As has been said, an interstate telephone mes-

sage may have no relation to business, it may be mere gossip; an interstate telegram may be one of sympathy or good will, wholly unconnected with business; passage over an interstate bridge need not be passage for any, even the remotest, errand of business,—yet in each case there is interstate commerce. The transit of persons from a foreign country to this country is commerce without regard to the purpose of their coming.

Henderson v. Mayor, 92 *U. S.*, 259.

People v. Compagnie Générale, 107 *U. S.*, 59.

Head Money Cases, 112 *U. S.*, 580.

Nishimura Ekiu v. United States, 142 *U. S.*, 651.

The transmission of persons from one state to another, not in the course of lawful business, but for unlawful and immoral purposes, is interstate commerce.

Hoke v. United States, 227 *U. S.*, 308.

Nor can it be said that this is because most transportation is for business purposes and a separation according to the purpose is impracticable in law which is a practical institution. This may be shown in two ways.

(1) Where material, lines very difficult of practical application are drawn in this same connection, e. g., between intrastate and interstate messages in case of telegraph and telephone companies.

Ratterman v. Western Union Telegraph Co., 127 *U. S.*, 411,

and between employment in intrastate and interstate transportation by a company engaged in both.

Howard v. Illinois Central R. Co., 207 *U. S.*, 463.

But no attempt is made to distinguish those foot passengers who pass across an interstate bridge for other than business purposes, and it is not suggested that tolls charged to tourists and fishermen for recreation may be taxed.

(2) When the purpose of passing of persons from one state to another is downright unlawful and admittedly and palpably has no relation to business or trade in any proper sense, such passing from state to state is held interstate commerce.

Hoke v. United States, 226 *U. S.*, 308.

Intercommunication, therefore — interstate intercourse or the transmission of something from one state to another — must be the sole requirement to constitute interstate commerce.

How, then, is a part (and to-day it is a very great and important part) of this intercommunication, of this intercourse, arbitrarily to be excluded from the operation and the protection of the Constitution because, although it takes the form of contracts made through interstate negotiations involving regular and continuous interstate communication and the transmission of moneys from one state to another, it chances to bear the name insurance?

If contemporary understanding is worth anything, insurance must be pronounced to be one of the first subjects in mind.

> "Franklin, Wilson and Hamilton, all members of the Constitutional Convention, are on record to the effect that insurance was then commerce."

Report of Committee on Insurance, 29 *Rep. Am. Bar Ass'n* (1906), 557.

Franklin, as a layman, may be disregarded, if one will. But there is a special reason for regarding the use of this term by lawyers in a legal document in the eighteenth century. At that time a succession of eminent writers upon commercial law on the Continent had developed the system which has now crystallized in the commercial codes to be found in all but English-speaking countries. Wilson (*Works, Andrews' Ed. II*, 139) urged the establishment of separate commercial courts in the United States, after the European model. And it

is notorious that American lawyers and publicists of the end of the eighteen century were well read in these treatises, which, founded upon the civil law and the law merchant, exercised so great an influence in the decisions upon mercantile questions, particularly in New York, in the first quarter of the nineteenth century. In the first volume of Johnson's Reports, reporting decisions of the Supreme Court of New York and the Court of Errors of New York during the year 1806, Pothier is cited four times, Emerigon five times, Valin three times, Casaregis twice and Azuni twice. The Institutes of Justinian are cited once. These citations are made by the court. In addition, counsel, so far as their arguments are reported, cite civilians (mostly French) repeatedly. In the seventh volume of the same reports, reporting decisions of the same courts during 1810 and 1811, Pothier is twice cited, Huberus twice, Emerigon once and the French Civil Code once. There are also two citations of the Digest, one of the Institutes and one of the Code. Almost all these citations are in cases involving questions of mercantile law. The term commerce had a well understood legal meaning to these lawyers and insurance was one of the chief subjects embraced therein. Indeed all codes of commerce, and these are founded upon the eighteenth century treatises with which the framers of the Constitution were familiar, include it.

German Commercial Code, §§ 1-3.

French Code of Commerce, Bk. II, tit. 10.

See also: *Commercial Code of Holland*, §§ 592, 685; Belgium, §§ 191-250; Italy §§ 604-641; Spain, §§ 737-805; Portugal, §§ 595-625; Chili, §§ 1155-1250; Argentina, §§ 1216-1312; Japan, §§ 650-676.

Hence it is of the first significance when we find Wilson, who wished to set up courts of commerce as well as courts of admiralty, speaking of insurance as a part of the commercial law, and Hamilton naming the regula-

tion of policies of insurance among the subjects to which the national power extended.

1 *Wilson, Works (Andrews' Ed.)*, 335.

3 *Hamilton, Works (Lodge's Ed.)*, 179, 203.

In so speaking they only expressed what was the common understanding of well-read lawyers of that time.

True, it should not be inferred from the foregoing that all insurance effected by foreign companies is therefore for that reason alone interstate commerce, no matter how the business is carried on. But the legal meaning of commerce when the Constitution was framed should be decisive against a construction which would exclude what would otherwise be interstate commerce from the purview of the Constitution because done in the course of an insurance business.

It need hardly be said that *Citizens Insurance Co. v. Parsons*, 7 *A. C.*, 96, has no bearing on this point, because the history of the British North America Act, there under consideration, is quite different from that of our Federal Constitution. The words there used have no such relation to the Continental publicists and civilians as have those used by the framers of our Constitution. Moreover in that case "trade and commerce"—thus suggesting the more limited interpretation of "commerce" as traffic only—were enumerated as one of twenty-nine subjects of legislation in a detailed list. Obviously therefore the word "commerce" was not used in a broad or general sense. The court held that under such circumstances the words could not be given their literal meaning, compared the Act with other acts of Parliament referring to "trade" only, and therefore gave to the phrase a narrower meaning than the well-settled meaning of "commerce" in our Constitution.

VIII.

The interpretation of Paul *v.* Virginia and the cases following it as holding that the business of insurance, no matter how conducted, can never be interstate commerce, has been uniformly criticized by those who have written upon that subject.

While the opinion of learned writers is not authority, a consensus of opinion among such writers is always highly significant. It is worth while, therefore, to note that all writers who have done more than repeat the language of *Paul v. Virginia* and assume it to be conclusive, have concurred in criticizing it, taking it to mean that the business of insurance, no matter how carried on, could never be interstate commerce.

2 *Willoughby, The Constitution*, §§ 294, 296.

1 *Watson, The Constitution*, 520-521.

Prentice and Egan, The Commerce Clause of the Federal Constitution, 46-49.

Innes, Insurance in its Relation to the Commerce Clause of the Federal Constitution, 39 *Am. Law Reg.* 717.

Report of the Committee on Insurance Law, 29 *Rep. Am. Bar Ass'n*, 538, 552.

Professor Willoughby says,—

> "These decisions of the court in *Paul v. Virginia* and *Hooper v. California*, which have since served as the basis of decisions with reference to other forms of insurance, have, since their rendition, been severely criticized. But, especially during recent years, when, with the enormous growth of insurance companies doing a business national in character, the need for federal regulation has seemed urgent to many, arguments have been put forth to show why the doctrine of the Supreme Court should be overruled, and companies doing an insurance business in more than one state be held to be engaged in interstate commerce.

"The act of 1903 which created the Department of Commerce and Labor provides that the department shall have the power 'to gather, compile, publish and supply useful information concerning corporations doing business within the limits of the United States as shall engage in interstate commerce or in commerce between the United States and a foreign country, *including corporations engaged in insurance*' . . . Furthermore, it is argued that the reasoning of the court in these decided cases has been defective in so far as it is based on the fact that a contract of insurance is not, in itself, an article of commerce. This, of course, is true, except in so far as it is treated as a piece of paper; but though not an article of commerce, it is, it is argued, an instrument of commerce. That is, for example, it is said, 'every contract of insurance is an agreement to pay, for which there is a sufficient consideration. Such being the substance of the contract, the final object of insurance, or of the insurance business, is an exchange of property. This fact stands out most clearly, perhaps, in life insurance, where A delivers annually to B a certain amount of property, and B in return, at a given date, or upon the happening of a given event, delivers to A or his appointee a certain amount of property. The property usually consists of money.'"

2 *Willoughby, the Constitution*, §294.

Suppose instead of premiums in money and payment of loss in money the contract provided for payment of each in merchandise? Would it be said this exchange taking place between different states was not interstate commerce? But is not money property, and is not exchange and consequent transportation of money, by whatever means commercial convenience and the course of business may dictate, commerce, at least as much as transportation of lottery tickets or transmission of instruction by a correspondence school?

Mr. Watson, after stating the reasoning in *Paul v. Virginia*, says:

"It does not seem that this covers the whole subject of insurance in its relation to interstate commerce, and it is difficult to understand why some phases of insurance are not interstate commerce. To illustrate, A in his office in New York City, sends B in Columbus, Ohio, a telegram; B receives it, that is interstate commerce. A immediately after wiring B signs his name as president of a life insurance company to a policy on B's life, and from the same office, and substantially at the same time at which he sends the telegram, mails the policy to B. B receives it in due time, that is not interstate commerce. Wherein is the distinction on principle? Mr. Justice Field in the language just quoted in *Paul v. Virginia* says: 'Contracts of insurance are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another and then put up for sale.' To this it can be replied that neither are telegrams subjects of trade and barter offered in the market nor are they commodities to be shipped or forwarded from one state to another and put up for sale. The elements which constitute one classification are not very different from the elements which constitute the other. If an insurance policy issued in one state on the life of a man in another state and mailed to him from one state to another state does not constitute interstate commerce, what is there that makes a telegram sent from one state to another under similar circumstances, interstate commerce? In the progress which the doctrine of interstate commerce is making, it is difficult to see how some branches of the insurance business can much longer be excluded from this regulation.

"Indeed so eminent an expounder of the Constitution as Alexander Hamilton expressed the opinion that the regulation of policies of insurance was commerce."

1 *Watson, The Constitution*, 520-521.

In appendix A of the report of the committee of the American Bar Association above referred to, it is shown

that in 1904 twenty leading life insurance companies in the United States wrote in their home states but .154 per cent. of the insurance which they wrote, out of $8,342,000,000 of policies in force; that they wrote in that year but .145 per cent. of new policies in their home states out of new policies in 1903 amounting to $1,552,000,000; that they received in 1903 as annual premiums $395,000,000 of which but .126 per cent. came from their home states. Of seventeen New York joint stock fire insurance companies it appeared that in 1903 of $5,740,000,000 of risks in force, only .252 per cent. was written in the home state; and that of $61,803 of premiums, only .167 per cent. came from the home state. It appeared that of six Pennsylvania joint stock companies having in force in 1903 $1,636,000,000 of fire insurance, only .105 per cent. was written in the home state and only 1 per cent. of the premiums came from the home state. It is shown that of eighteen stock insurance companies of other states, having in force in 1903 $5,220,000,000 of insurance, only .053 per cent. of such insurance was written in the home state and only .049 per cent. of the premiums came from the home state.

In comparison with such a showing as this, is not the interstate business disclosed in *International Text Book Co. v. Pigg*, the merest bagatelle? And what does the obstruction to interstate commerce involved in that case amount to as compared with the oppressive exactions upon interstate transaction of insurance business set forth in the report above quoted on pages 541 545? Of these exactions we have had a signal example during the present year in the attempt of one of our states, which had laid such burdens upon foreign fire insurance companies as to compel them to withdraw from the state, to enjoin them from doing so. It cannot be that an interstate business of this magnitude and of such conspicuous national importance was meant to be left, alone of all interstate transactions and of all intercourse between the states, to the mercy of conflicting and burdensome local legislation.

As long ago as 1904 President Roosevelt in his annual message called attention to this matter and urged an endeavor to deal with interstate insurance by federal legislation.

IX.

The pretended tax in controversy here, being imposed as a condition of engaging in interstate commerce is invalid.

If the foregoing arguments are well taken, the proposition that the pretended tax imposed by the state of Montana is void should go without saying.

State legislation seeking to impose a direct burden upon interstate commerce or to interfere directly with its freedom, encroaches upon the exclusive power of Congress and is void.

Hall v. De Cuir, 95 *U. S.*, 485.

Wabash St. L. & P. R. Co. v. Illinois, 118 *U. S.*, 557.

Western Union Telegraph Co. v. Pendleton, 122 *U. S.*, 357.

Kidd v. Pearson, 128 *U. S.*, 23.

Lyng v. Michigan, 135 *U. S.* 161.

Postal Telegraph Cable Co. v. Adams, 155 *U. S.*, 688.

Missouri K. & T. R. Co. v. Haber, 169 *U. S.*, 642.

Rhodes v. Iowa, 170 *U. S.*, 424.

Louisville & N. R. Co. v. Eubank, 184 *U. S.*, 40.

Hanley v. Kansas City S. R. Co., 187 *U. S.*, 620.

Just as the tax on the tolls received for interstate messages or upon the tolls received for foot passengers crossing an interstate bridge (*Covington Bridge Co. v. Kentucky*, 154 *U. S.*, 204) failed, the pretended tax in the case at bar must fail also.

It is true enough that a state may tax as property the franchise of a home company, which the state itself has granted, even though such company be engaged in interstate commerce.

It is true also that the property of any company in any state may be taxed as such. But here the record discloses that the real property of the plaintiff in Montana, if any, is taxed separately, and that it has no other property therein save, perhaps, a bank account that never exceeds $500, upon which the tax in question cannot be pretended to be levied, for it proceeds, wholly in disregard of the amount thereof, on the basis of the interstate commerce transacted by the plaintiff during the year, and is imposed upon the value of the privilege of doing that interstate business.

It is equally true that the instrumentalities of commerce maintained within the state by a foreign company and so having their situs therein may be taxed as property. No such question is here involved. The tax here is on the excess of money removed from the state in the course of plaintiff's interstate business each year over that returned to the state thereby.

That the statute lays the same tax upon *domestic* business of the same kind is quite immaterial, since such business is within its own control.

Robbins v. Shelby Taxing District, 120 *U. S.*, 489.

Norfolk & W. R. Co. v. Pennsylvania, 136 *U. S.*, 114.

Minnesota v. Barber, 136 *U. S.*, 313.

If the company were a home company, Montana could impose an excise tax upon it. But the plaintiff pays a license fee to do business in Montana as it is, and it does not in any degree derive from Montana the right to carry on the interstate commerce which that state seeks to tax.

The power to exclude or to impose terms upon the doing of business within the state by foreign corpora-

tions does not extend to obstruction of or interference with interstate commerce.

International Text Book Co. v. Pigg, 217 U. S., 91.

Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S., 1.

Fargo v. Michigan, 121 U. S., 230.

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S., 18.

Indeed the *International Text Book Co.* case is so recent and so thoroughly in point that further discussion of this point seems quite unnecessary.

X.

Under the laws of Montana, an action against the County is the proper and prescribed one to recover for taxes paid under protest under such circumstances as those in the case at bar.

That the action brought in this case is the proper remedy is made clear by 2742, Revised Codes of Montana (1907), which reads as follows:

> "That in all cases of levy of taxes, licenses or other demands for public revenue, which is deemed unlawful by the party whose property is thus taxed, or from whom such tax or license is demanded or enforced, such party may pay under protest such tax or license or any part thereof deemed unlawful, to the officers designated and authorized by law to collect the same; and thereupon the party so praying [*sic*], or his legal representative, may bring an action in any court of competent jurisdiction against the officer to whom said tax or license was paid or against the county or municipality on whose behalf the same was collected, to recover such tax or license or any portion thereof paid under protest. The tax so paid under protest shall be held by the County

Treasurer and no part thereof paid to the State Treasurer until the determination of any action brought for the recovery thereof."

This tax therefore being a burden upon interstate commerce and for that reason void, the judgment of the Supreme Court of Montana holding that it is a valid tax should be reversed.

Respectfully submitted,

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20 October, 1913.

Office Supreme Court, U. S.
FILED.
DEC 6 1911
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1911

No. ~~888~~. 56

NEW YORK LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

DEER LODGE COUNTY,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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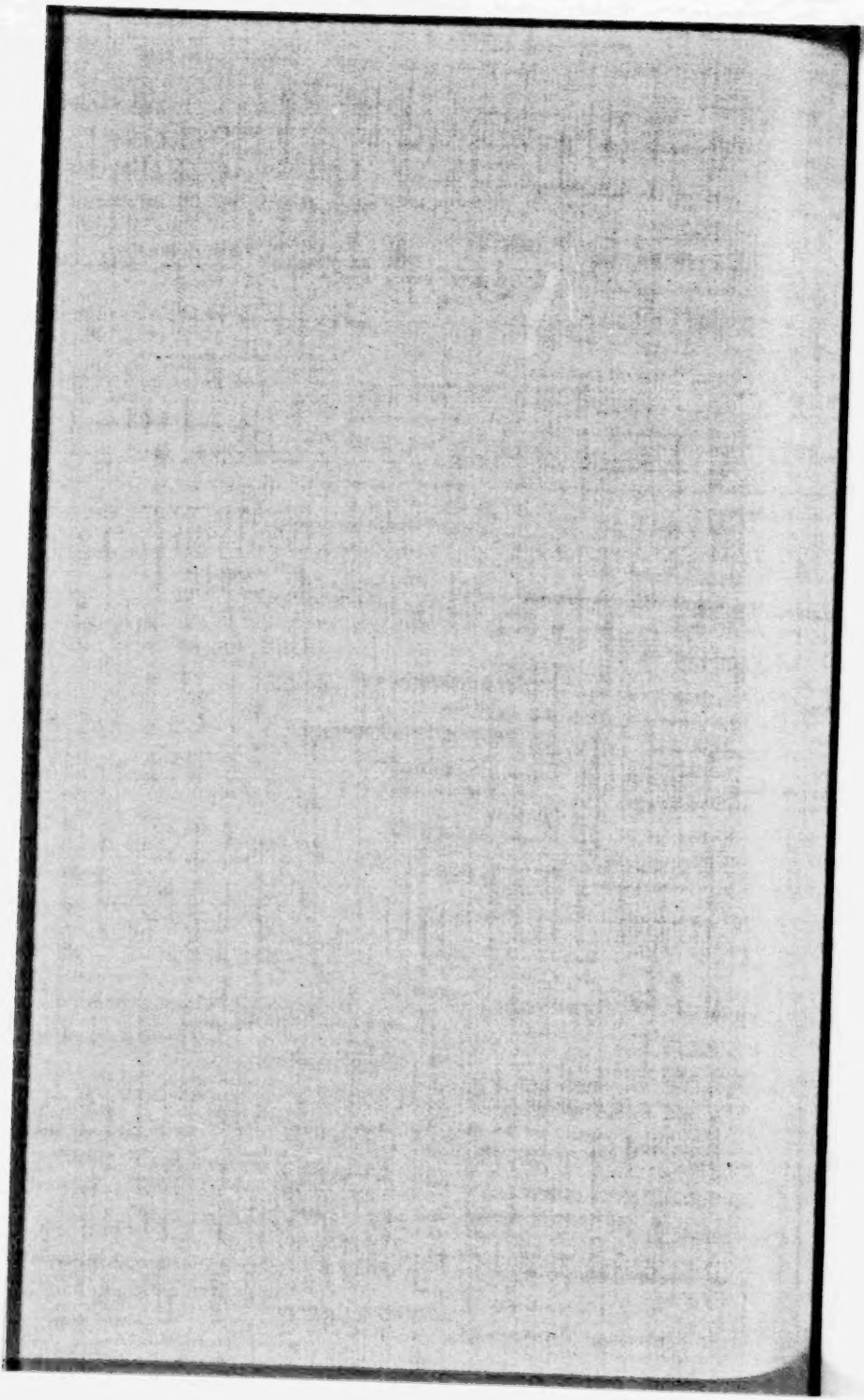

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NEW YORK LIFE INSURANCE COMPANY,
Plaintiff in Error.

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Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error is a life insurance company incorporated in the state of New York under the laws of that state and by complying with the laws of the state of Montana relative to the admission of foreign corporations was admitted to do business in the state of Montana long prior to the year 1909 and ever since such admission said plaintiff in error has continued to do business in Montana and is now doing business therein. During the year 1909 the year's business constituting the basis for this assessment and taxation, the plaintiff in error had insurance in force in the State of Montana amounting to $10,023,445.00 and called for premiums for the year 1909 in the sum of $343,664.93, and during said year 1909, plaintiff in error received from its policy holders residing in said Deer Lodge County, Mon-

tana, premiums aggregating $14,233.41, and that the ordinary expenses incurred and losses paid by plaintiff in error in said Deer Lodge County for said year 1909 was the sum of $8,888.41; that the excess of permiums so received over losses and ordinary expenses incurred in said county for the year 1909 was the sum of $5,345. During the year 1910 the County Assessor of defendant in error under the authority of the State Constitution and of the Statutes of Montana, assessed said plaintiff in error in the sum of $5,345, "upon the excess of premiums received over losses and ordinary expenses incurred * * * * during the year previous," (1909) which constitution and statute are as follows:

CONSTITUTION.

"Sec. 1, Art. XII. The necessary revenue for the support and maintenance of the state shall be provided by the legislative assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for in this article. The legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in the state.

Sec. 2, Art. XII. The property of the United States, the state, counties, cities, towns, school districts, municipal corporations and public libraries shall be exempt from taxation; and such other property as may be used exclusively for agricultural and horticultural societies, for educational purposes, places for actual religious worship, hospitals and places of burial not used or held for private or corporate profit, and institutions of purely public charity may be exempt from taxation.

Sec. 17, Art. XII. The word property as used in this article is hereby declared to include moneys, credits, bonds, stocks, franchises and all matters and things (real, personal and mixed) capable of private ownership, but this shall not be construed so as to authorize the tax-

ation of the stocks of any company or corporation when the property of such company or corporation represented by such stocks is within the state and has been taxed.

Sec. 7, Art. XII. The power to tax corporations or corporate property shall never be relinquished or suspended, and all corporations in this state, or doing business therein, shall be subject to taxation for state, county, school, municipal and other purposes, on real and personal property owned or used by them and not by this constitution exempted from taxation.

Sec. 11, Art. XV. No foreign corporation shall do any business in this state without having one or more known places of business, and an authorized agent or agents in the same, upon whom process may be served. And no company or corporation formed under the laws of any other country, state or territory, shall have, or be allowed to exercise, or enjoy within this state any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of the state."

STATUTE.

"Sec. 4073. Revised Codes of 1907. Each and every insurance corporation or company transacting business in this state must be taxed upon the excess of premiums received over losses and ordinary expenses incurred within the state during the year previous to the year of listing in the county where the agent conducts the business, properly proportioned by the corporation or company at the same rate that all other personal property is taxed, and the agent shall render the list, and be personally liable for the tax; and if he refuses to render the list or make affidavit that the same is correct, to the best of his knowledge and belief, the amount may be assessed according to the best knowledge and discretion of the assessor. Insurance companies and corporations are subject to no other taxation under the laws of this state, except taxes on real estate and the fees imposed by law."

Afterwards the taxing authorities of said defendant in

error levied a tax upon said assessment amounting to the sum of $209.79. Thereafter plaintiff in error under authority of Section 2742 of the Revised Codes of Montana of 1907, paid said tax under protest and subsequently and within the time required by law instituted action in the district court of said defendant county to recover the tax so paid. Said Section 2742 being as follows:

> "Sec. 2742. That in all cases of levy of taxes, licenses, or other demands for public revenue, which are deemed unlawful, by the party whose property is thus taxed, or from whom such tax or license is demanded or enforced, such party may pay under protest such tax or license, or any part thereof, deemed unlawful, to the officers designated and authorized to collect same; and thereupon, the party so paying, or his legal representatives, may bring an action in any Court of competent jurisdiction against the officer to whom said license or tax was paid, or against the county or municipality on whose behalf the same was collected, to recover such tax or license, or any portion thereof, paid under protest; provided, that any action instituted to recover any tax paid under protest, shall be commenced within sixty days after the thirtieth day of November, of the year in which such tax was paid. The tax so paid under protest, shall be held by the County Treasurer, and no part thereof paid to the State Treasurer until the determination of any action brought for the recovery thereof; and provided further, that in all cases where taxes, licenses or other demands have been paid under protest, during the year 1907, or 1908, and no suit has been brought to recover the same, action to recover the same as herein provided shall be brought within sixty days after the passage and approval of this Act; and if not so brought, the same shall be forever barred."

Section 2745 of the Revised Codes of 1907 relating to the method of enabling a tax payer to protect himself from the payment of illegal taxes, provides:

"Section 2745. The remedy hereby provided shall supercede the remedy of injunction and all other remedies which might be invoked to prevent the collection of taxes or licenses alleged to be irregularly levied or demanded, except in unusual cases where the remedy hereby provided is deemed by the court to be inadequate."

In this action, however, the plaintiff in error chose to pay the tax under protest and then institute action for the recovery of the same under the provisions of said Section 2742. Judgment in the district court of said defendant county was entered in favor of said county from which judgment the defendant appealed to the Supreme Court of the State of Montana where the judgment entered below was affirmed and the cause is now brought to this Court and is now pending here on writ of error for final adjudication.

QUESTIONS PRESENTED.

In determining the questions presented to this Honorable Court the defendant in error can have recourse only to the record filed in the State Supreme Court for the defendant in error has not the opportunity of examination of either the record or brief filed in this Court.

The ground on which the plaintiff in error based this action in the District (Trial) Court of defendant county is stated in Section Eleven of the complaint as follows:

"Eleventh. Said tax was and is illegal, unlawful, and void, for that,
Said defendant was without jurisdiction to levy or collect said tax, and the levy and collection thereof was and is a burden upon interstate commerce contrary to Section 8, of Article I, of the Constitution of the United States."

On appeal to the State Supreme Court but one error was specified, to-wit:

"that said tax is unconstitutional and void, for,

"That the same is a burden upon interstate commerce, and is contrary to and in violation of that clause of Section Eight, of Article I, of the Constitution of the United States, which invests the congress of the United States with 'power and authority to regulate commerce with foreign nations, and among the several states, and with the Indian tribes,' and that the transaction of the business of life insurance in the manner described in appellant's compalint, is interstate commerce."

As we understand this record the only federal questions that can be predicated thereon, are,

1. That the state statute violates the first clause of Section 2, Article IV, of the Constitution of the United States, that

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

2. That the state statute violates that clause of Section 8, Article I of the Constitution of the United States which confers authority and power upon congress,

> "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

It is probable too, that it will be claimed that the provisions of the Fourteenth Amendment to the Constitution of the United States have been invaded.

The state law on which defendant in error relies for its authority in the levy and collection of this tax is Section 4073 of the Montana Revised Codes of 1907, here quoted:

> "Each and every insurance corporation or company transacting business in this State must be taxed upon the excess of premiums received over losses and ordinary expenses incurred within the state during the year previous to the year of listing in the county where the agent

conducts the business, properly proportioned by the corporation or company at the same rate that all other personal property is taxed, and the agent shall render the list, and be personally liable for the tax; and if he refuse to render the list or to make affidavit that the same is correct, to the best of his knowledge and belief, the amount may be assessed according to the best knowledge and discretion of the assessor."

The concluding clause of this section, as it appears in the Codes, was held void as being violative of the provisions of the State Constitution in *Northwestern Mutual Life Insurance Co. v. Lewis and Clark County, 28 Mont. 484.*

This clause reads as follows:

"Insurance companies and corporations are subject to no other taxation under the laws of this state, except taxes on real estate and the fees imposed by law."

It will be noticed from the reading of this statute that it indiscriminately applies to all insurance companies both domestic and foreign. The Supreme Court of Montana, in considering its validity in the case above stated, said:

"The provisions of the Section of the statute under consideration apply indiscriminately to 'each and every insurance corporation or company transacting business in this state.' This includes domestic as well as foreign insurance companies. The law is therefore 'uniform upon the same class of subjects.' The legislature has the right to prescribe reasonable terms upon which foreign corporations may do business in this state. (*Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357; Southern B. & L. Association v. Norman, 98 Ky. 294, 32 S. W. 952; Scottish U. & N. Insurance Co. v. Herriott, 109 Iowa, 606, 80 N. W. 665, 77 Am. St. Rep. 548.*) The character, kind and amount of business done by the company, as well as the situs of its tangible property, may be considered in applying the various systems of taxation."

(Northwestern Mutual Life Insurance Co. v. Lewis and Clark County, 28 Mont. 484.)

But if the statute did discriminate against foreign corporations it would not be violative of Section 2, Article IV, of the United States Constitution, nor would it violate the provisions of the Fourteenth Amendment to said constitution, for a corporation is not a citizen within the meaning of these provisions of the federal constitution in so far as its right to the business in the state is involved.

This has been the holding of this court in so many cases that it may be regarded as the settled law:

Paul v. Virginia, 8 Wall. 168.
New York Life Insurance Co. v. Cravens, 178 U. S. 389.
Security Mutual Life Insurance Co. v. Prewitt, 202 U. S. 246,
Western Union Telegraph Co. v. Kansas, 216 U. S. 1.
Bank of Augusta v. Earle, 13 Pet. 519.
Gulf C. & S. F. Co. v. Ellis, 165 U. S. 150.
Ex parte case, 116 Pac. 1037.

II.

Defendant in error contends that the statute in question does not violate the interstate commerce clause of the federal Constitution for the reason that business of insurance is not commerce.

The validity of this statute has been twice sustained by the State Supreme Court, once in a case,

> "instituted for the purpose of determining the validity of a tax claimed to be due from the plaintiff to the defendant 'upon the excess of premiums received over losses and ordinary expenses incurred within the state' during the previous year."
>
> New York Mutual Life Insurance Co. v. Lewis and Clark County, 28 Mont. 484.

and again in the case at bar reported in 43 Montana —, 115

Pac. Rep. 911. This statute relates only to the net proceeds of business done *within the state.*

Similar statutes have been many times sustained by this court.

Pacific Express Co. v. Seibert, 132 U. S. 339, was a suit in equity calling in question a statute of the State of Missouri which required foreign express companies to make a statement of their gross receipts and to pay

> "into the treasury of the state the sum of Two Dollars for each One Hundred Dollars of said receipts."

The court, in considering the question involved, said:

> "The act in question, after defining in its first section what shall constitute an express company or what shall be deemed to be such in the sense of the act, requires such express company to file with the state auditor an annual report 'showing the entire receipts for business done *within the State,*' etc., and further provides that the amount which any express company pays 'to the railroads or steamboats *within this State* for the transportation of their freight *within this State*' may be deducted from the gross receipts of the company on such business; and the act also requires the company making a statement of its receipts to include, as such, all sums earned or charged 'for the business done *within this State,*' etc. It is manifest that these provisions of the statute, so far from imposing a tax upon the receipts derived from the transportation of goods between other States and the State of Missouri, expressly limit the tax to receipts for the sums earned and charged for the *business done within the State.* This positive and oft repeated limitation to business done within the State, that is, business begun and ended within the State, evidently intended to exclude, and the language employed certainly does exclude, the idea that the tax is to be imposed upon the interstate business of the company. 'Business done within this State' cannot be made to mean business done between that State and other States. We, therefore, concur in the view of

> the court below that it was not the legislative intention, in the enactment of this statute to impinge on interstate commerce, or to interfere with it in any way whatever, and that the statute, when fairly construed, does not in any manner interfere with interstate commerce."

Further on in the same decision, the court used this language:

> "On the other hand, express companies, such as are defined by this act, have no tangible property, of any consequence, subject to taxation under the general laws. There is, therefore, no way by which they can be taxed at all unless by a tax upon their receipts for business transacted."

The State Supreme Court, in considering this question, in *Northwestern Mutual Life Insurance Co. v. Lewis and Clark County, supra*, said:

> "The nature of the business transacted by an insurance company does not require it to have any tangible property within the state on the first Monday in March of each year, when property becomes liable for taxation. Yet its business is here; it owns or possesses the privilege of doing that business within this state; and under the provisions of Section 681, *supra*, (Section 4073, Revised Codes, 1907) the business transacted must result in a profit to the company before taxes can be levied. If the privilege granted which has the force and effect of a franchise, and is therefore property under the constitution, proves to be valuable, it is a proper subject for taxation within the meaning of Article XII of the State Constitution. Whether this is regarded as a tax upon the value of the franchise right of the company to do business in this state, measured by the net income, or as a tax on the business established and done, regarded as property separate from the money received as premiums, the value of which is measured by the same standard, is immaterial. The tax remains the same."

Security Mutual Life Insurance Co. v. Prewitt, 202 U. S. 246, involves the constitutionality of a State law (Kentucky) requiring foreign insurance companies to file consent to be sued in the State Courts, and making it the duty of the Commissioner to revoke all authority of the company to do business in the State in case any suit is instituted in, or removed to any Federal Court by such company. In sustaining the statute the Court said in part:

> "A State has the right to prohibit a foreign corporation from doing business within its borders unless such prohibition is so conditioned as to violate some provision of the Federal Constitution. Among the later authorities on that proposition are: *Hooper v. California, 155 U. S. 648; Allgeyer v. Louisiana, 165 U. S. 578; Orient Insurance Co. v. Daggs, 172 U. S. 557; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28; New York Life Insurance Co. v. Cravens, 178 U. S. 389; Hancock Mutual Life Insurance Co. v. Warren, 181 U. S. 73.* Having the power to prevent a foreign insurance company from doing business at all within the State, we think the State can enact a statute such as is above set forth."

In *Insurance Co. v. Morse, 20 Wall. 445*, a similar statute of the State of Wisconsin was sustained. In *Nutting v. Massachusetts, 183 U. S. 553*, it is held,

> "A State has the undoubted power to prohibit foreign insurance companies from making contracts of insurance, marine or other within its limits, except upon such conditions as the State may prescribe not interfering with interstate commerce. A contract of marine insurance is not an instrumentality of commerce but a mere incident of commercial intercourse. The State, having the power to impose conditions on the transaction of business by foreign insurance companies within its limits, has the equal right to prohibit the transaction of such business by agents of such companies or by insurance brokers who are to some extent, the representatives of both parties."

Similar statutes are sustained in

Philadelphia Fire Insurance Co. v. New York, 119 U. S. 110,
Hooper v. California, 155 U. S. 648,
Ducat v. Chicago, 10 Wall. 410,
Western Union v. Kansas, 216 U. S. 1.

The decisions in all these cases are wholly incompatible with the theory of plaintiff in error that a contract of insurance is interstate commerce.

But this court has gone farther. It has repeatedly held that issuing policies of insurance are not transactions of commerce. In *Paul v. Virginia, 8 Wall. 168*, this court passed upon the validity of a statute of Virginia which required foreign insurance companies to obtain a license from a State and make a deposit of bonds of a specified character. The court in sustaining the statute said in part:

> "We proceed to the second objection urged to the validity of the Virginia statute, which is founded upon the commercial clause of the Constitution. It is undoubtedly true, as stated by counsel, that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. At the time of the formation of the Constitution a large part of the commerce of the world was carried on by corporations. The East India Company, the Hudson's Bay Company, the Hamburgh Company, the Levant Company, and the Virginia Company, may be named among the many corporations then in existence which acquired, from the extent of their operations, celebrity throughout the commercial world. This state of facts forbids the supposition that it was intended in the grant of power to Congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations, and corporations.

There is, therefore, nothing in the fact that the insurance companies of New York are corporations to impair the force of the argument of counsel. The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not inter-state transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

In *New York Life Insurance Co. v. Cravens, 178 U. S. 389*, this court had under consideration a statute of Missouri which provided that,

> "no policy of insurance on life * * * issued, after payment upon it of two full annual premiums, be forfeited."

A policy of insurance, in that case, declared

> "that the entire contract contained in the said policy and in this application, taken together, shall be construed and interpreted as a whole and in each of its parts and obligations, according to the laws of the

> State of New York, the place of the contract being expressly agreed to be the principal office of the said company in the city of New York."

The court after holding that notwithstanding this provision in the contract, the contract itself was subject to the laws of the State of Missouri regulating life insurance policies, and the court, in considering the interstate commerce feature of the question involved, said:

> "Is the statute an attempted regulation of commerce between the States? In other words, is mutual life insurance commerce between the States?
>
> That the business of fire insurance is not interstate commerce is decided in *Paul v. Virginia*, 8 Wall. 168; *Liverpool Insurance Co. v. Mass.* 10 Wall. 566; *Phila. Fire Asso. v. New York*, 119 U. S. 110. That the business of marine insurance is not is decided in *Hooper v. California*, 155 U. S. 648. In the latter case it is said that the contention that it is 'involves an erroneous conception of what constitutes interstate commerce.'
>
> We omit the reasoning by which that is demonstrated, and will only repeat, 'The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the 'perils of the sea.' And we add, or against the uncertainty of man's mortality."

Much of the complaint in this action is devoted to a narration of the particular manner in which plaintiff in error conducts its business. This statement, however, is not especially different from that in *New York Life Insurance Co. v. Cravens*, 178 U. S. 389, wherein this court sustained the State law. The particular method of conducting the business is governed by the rules of the corporation, but these rules can not have the effect of making the company immune

from taxation; neither can they change the nature of the company's business. It is still life insurance. The contract of insurance is entered into in defendant county. The policy is held and owned by a resident of that county, and when such policy matures it is paid there (Sub. Div. 6, Par. "Fourth," of Complaint). The company does a loan business aggregating more than $432,000.00 to its policy holders in the State of Montana (Sub. Div. 5, Par. "Fourth," of Complaint.)

It is immaterial whether the policy holder pays the premium direct to the agent in such county (Sub. Div. 1, Par. "Fourth", of Complaint) or pays it at the company's office in Butte, Montana, or whether he deposits it in his home Post Office for transmittal to the "Home Office" of the company in New York. (Sub. Div. 4, Par. "Fourth", of Complaint).

It still remains premiums received *within the state*, and in this case, within defendant county.

From where else were the premiums received? When the policy holder delivered the money to the company's agent, or deposited it in the Post Office addressed to the "home office," he lost jurisdiction over it and under the statement in the complaint, it was payment to the company.

In considering the various provisions of the State Constitution relating to the duty of the legislative department of the State government regulating taxation, the Supreme Court of Montana said in part:

> "and it is provided that the legislature *shall* provide this revenue, *shall* levy a uniform rate of taxation, *shall* prescribe such regulations as shall secure a just valuation of *all* property unless otherwise provided (Section 1, Art. XII, Const.), that the power to tax corporations and corporate property shall never be relinquished or suspended (Section 7, Art. XII), and taxes shall be uniform upon the same class of subjects (Section 11,

Art. XII). These provisions of the Constitution are mandatory. (Section 29, Art. III). It was the plain duty of the legislature to provide for the assessment and taxation of all the property of corporations situated within this state, as the word "property" is defined by the Constitution itself. (Section 17, Art. XII.)"

N. W. M. L. Ins. Co. v. L. and C. County, 28 Mont. 484.

Section 11, of Article XV, of the Montana Constitution, is as follows:

"No foreign corporation shall do any business in this State without having one or more known places of business, and an authorized agent, or agents, in the same, upon whom process may be served. And no company, or corporation, formed under the laws of any other country, state, or territory, shall have, or be allowed to exercise, or enjoy within this state any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of the state."

This section of the State Constitution is self executing as a prohibition upon foreign corporations from enjoying within the State any greater privileges than are enjoyed by like corporations created under the laws of the state.

Criswell v. Mont. Cent. Ry. Co. 18 Mont. 168.

All domestic corporations are subject to this tax. Is there any reason why a foreign corporation should enjoy special privileges and immunities, and that too under a constitution prohibiting it? May a foreign corporation, by a code of rules adopted by itself, circumvent, nullify, or render inoperative, a State constitution?

"Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts, —until delivered by the agent in Virginia (Montana). They are then local transactions and are governed by

the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia (Montana) by a citizen of New York whilst in Virginia (Montana) would constitute a portion of such commerce."

Paul v. Virginia, 8 Wall, 168.

It is alleged in Paragraph Nine, of the complaint, that the plaintiff in error had no property in said county at any time during the year 1910, but in Paragraph Ten, of said complaint, it is admitted that the plaintiff in error collected from policy holders residing in said Deer Lodge county, during the year 1909, $14,233.41, as premiums, and it is also admitted, in said paragraph, that the excess of premiums so received over losses and ordinary expenses, for said year 1909, was the sum of $5,345.00. Under the provisions of the statute in question, 4073, of the Revised Codes,

> "the excess of premiums received over losses and ordinary expenses incurred within the state during the year previous to the year of listing in the county,"

is taken as the assessment for taxation for that year. Hence the excess of premiums over losses and ordinary expenses for for the year 1909, constitutes the assessment for taxation for the year 1910, which is the year when these taxes were levied and assessed. It is therefore immaterial whether the plaintiff had any property in said county during the year 1910, for it had not theretofore paid this ad valorem tax upon the property which it had in the county during the previous year, and it is the premiums received by the company during the year 1909 that constitutes the assessment for this tax.

It is further alleged in said Paragraph Nine, of the complaint, that the plaintiff, during the year 1909, paid under the provisions of Section 4017, of the Revised Codes of Montana, a tax aggregating the sum of $6,933.41, and that down to July 1st, 1910, it paid the two quarterly installments

called for, by said section, which aggregated $3,496.85; and that it also, during the said year, paid to said state, licenses and fees aggregating the sum of $234.00.

We confess we do not understand what is meant by the last clause of this paragraph of the complaint, nor do we know to which of the years named in that paragraph, it relates. Said Section 4017, of the Revised Codes of Montana, referred to in the paragraph, is as follows:

> 4017. *License fee.*—All insurance corporations, associations and societies as hereinbefore specified in the preceding section, before commencing to do business in the State of Montana, shall be required to secure a license authorizing them to transact business of insurance corporations, associations or societies, and shall pay to the State Auditor for such license the following fees:
>
> For a license to collect in any one year premiums amounting to the sum of five thousand dollars or less, one hundred and twenty-five dollars.
>
> For a license to collect in any one year premiums over the sum of five thousand dollars, the sum of twenty dollars for each and every one thousand dollars to be so collected."

This Section, as will be seen, relates wholly to the license fee, and has no connection whatsoever with said Section 4073, and we do not understand that Section 4017 is called in question in this case. Under the provisions of this Section, 4017, the company makes its own estimate of amount of premiums it expects to collect during the year, and then pays the license fee upon this estimate that it makes itself. If it makes an over estimate, that cannot affect the vailidity of the statute. It appears, however, by Paragraph Three of the complaint, that the company, during the year 1909, did a business aggregating $343,664.93 in premiums. The right of the State to levy and collect the license fee provided

for in Section 4017, has been many times sustained by this court.

Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246,
Western Union v. Kansas, 216 U. S. 1,
Pacific Express Co. v. Seibert, 142 U. S. 339,
Paul v. Virginia, 8 Wall. 168.

In addition to the license fees required by said Section 4017 of the Revised Codes of Montana above quoted, life insurance companies are required to make to the State Auditor of the State of Montana an annual report and to pay to the Auditor for the State of Montana the sum of twenty-five dollars for filing such report. Section 4152, Revised Codes of Montana of 1907.

In addition to this license under the provisions of Section 4023 of the Revised Codes of Montana, agents of life insurance companies doing business in said state must procure from the State Auditor an annual certificate of authority and pay to the State the sum of five dollars for each certificate so issued.

These are all the provisions of Montana law relating to licenses and taxation of life insurance companies after the issuance of the permit to do business in the State of Montana.

The allegations of paragraph "ninth" of the complaint filed in this cause must, therefore, have reference to these license fees, but the provisions of neither said sections 4017—4023 or 4152 of the Revised Codes of Montana are called in question in this cause.

For the reasons and upon the authorities above cited, we respectfully submit that the decision of the Supreme Court of the State of Montana, in sustaining the validity of Section 4073, of the Revised Codes of Montana of 1907, and

in sustaining the validity of the levy and collection of the taxes involved in this action, should be sustained.

Respectfully submitted,

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